SUPREME COURT, U. S

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-927

FOREST HILLS UTILITY COMPANY,
Petitioner,

v.

IRA L. WHITMAN, DIRECTOR OF ENVIRONMENTAL PROTECTION,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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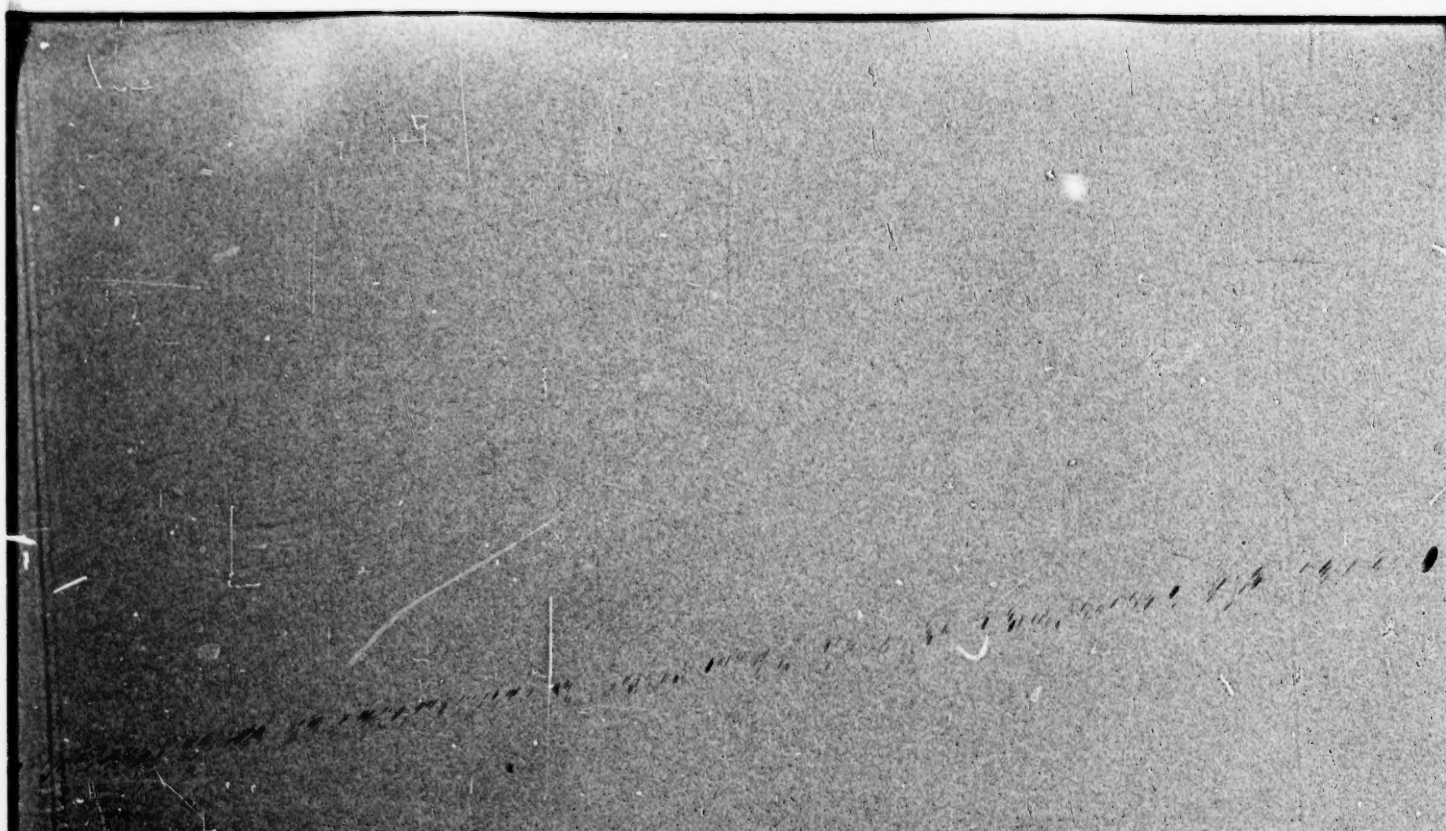

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. _____

FOREST HILLS UTILITY COMPANY,
Petitioner,

v.

IRA L. WHITMAN, DIRECTOR OF ENVIRONMENTAL PROTECTION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

The petitioner, Forest Hills Utility Company, prays for a writ of certiorari to review the orders of the Supreme Court of Ohio entered October 4, 1974, overruling its motion to certify and dismissing, *sua sponte,* its appeal of right from the judgments entered by the Court of Appeals for Franklin County, Ohio, on June 6, 1974, affirming the orders of the Environmental Board of Review, affirming the orders of the respondent.

OPINIONS BELOW

The Supreme Court of Ohio wrote no opinion. The Court of Appeals for Franklin County, Ohio, rendered a written decision on May 21, 1974 (App. A, *infra,*

pp. 17-23), affirming the orders of the Environmental Board of Review entered December 13, 1973 (App. B, *infra*, pp. 24-56), affirming the order of the respondent journalized October 10, 1973 (App. C, *infra*, pp. 57-60).

JURISDICTION

The orders of the Supreme Court of Ohio entered on October 4, 1974, overruling petitioner's motions for an order directing the Court of Appeals for Franklin County, Ohio, to certify its records (App. D, *infra*, p. 61) and dismissing, *sua sponte*, the appeal of right (App. E, *infra*, p. 62) are attached hereto, as well as the order of November 1, 1974, denying rehearing in Case No. 74-659 (App. F, *infra*, p. 63). The jurisdiction of this Court is invoked under Rule 19 and 28 U.S.C. 1257(3), which provide for review of final judgments rendered by the highest court of a state by a writ of certiorari, "where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States."

QUESTIONS PRESENTED

1. Whether the orders of the Ohio Director of Environmental Protection compelling a public utility corporation, which owns and operates a water works system to permit a municipal corporation to use its water lines and system, and to prohibit any tampering with or hindering the passage of the municipality's water through such lines and system, takes private property without due process contrary to the Fourteenth Amendment to the Constitution of the United States?

2. Whether the orders of the Ohio Director of Environmental Protection compelling a public utility corporation, which owns and operates a water works system to serve customers who have failed and refused to pay the lawful rates and charges for such water service takes the utility's private property without due process contrary to the Fourteenth Amendment to the Constitution of the United States?

PERTINENT CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

The text of the relevant constitutional, statutory and regulatory provisions involved herein is contained in Appendix G, *infra*, pp. 64-71. The relevant provisions are:

Fourteenth Amendment to the Constitution of the United States.

§ 4905.32, Revised Code of Ohio
§ 6111.03, Revised Code of Ohio
§ 6111.06, Revised Code of Ohio
§ 6111.16, Revised Code of Ohio
§ 6111.17, Revised Code of Ohio
§ 6111.23, Revised Code of Ohio

STATEMENT OF THE CASE

On July 9, 1973, the Director of Environmental Protection, hereinafter called respondent, without notice or hearing, issued orders (App. H, *infra*, pp. 72-74) to petitioner commanding petitioner to perform specific acts, which may be summarized as follows:

(1) to immediately allow water from the City of Heath to flow through the public utility's water

lines serving the resident of Forest Hills Subdivision;

(2) to prohibit any tampering with or hindering the passage of water from the City of Heath through the public utility's water system;

(3) to take immediate action to assure that the incoming water from the City of Heath does not become contaminated in any manner by the public utility's pipe lines or system; and

(4) to continue to permit the flow of water from the City of Heath through petitioner's pipe lines until the respondent determines (a) that the petitioner has instituted a public water supply with adequate pressure and sufficient quantity and quality to protect the public health and (b) that there is no threat of contamination or inadequacy of such public water supply.

In Case No. 73-874, now pending on its merits before the Supreme Court of Ohio, the petitioner gave notice of its appeal to the Common Pleas Court of Franklin County, Ohio, under Chapter 119, Revised Code of Ohio, on July 18, 1973. At the same time, petitioner applied for and secured a stay of execution of the respondent's orders. Thereafter, on July 20, 1973, the respondent filed motions to dismiss the appeal and dissolve the stay order, which were denied. Upon appeal by respondent, on August 7, 1973, the Court of Appeals for Franklin County, Ohio, *sua sponte*, without briefing or argument, dismissed the petitioner's appeal to the Court of Common Pleas and remanded the cause to the respondent for a hearing in accordance with the provisions of § 6111.06 (C), Revised Code of Ohio.

In Case No. 73-915, now pending on its merits before the Supreme Court of Ohio, the petitioner, on July 18, 1973, filed its notice of appeal to the Environmental Board of Review, hereinafter called Board, from respondent's order of July 9, 1973, and applied for an order suspending and staying the execution of respondent's orders pending determination of the appeal before such Board. Following a hearing on August 9, 1973, before the Board, a decision was journalized denying petitioner's motion for stay. Thereafter, on August 10, 1973, the Board issued a ruling on jurisdiction and final order. These orders of the Board were appealed to the Court of Appeals for Franklin County, Ohio, which remanded the case to the Board for hearing and determination on the merits.

There is no dispute that the Court of Appeals in Case No. 73-874, remanded the administrative order to the respondent for hearing and final order and in Case No. 73-915, remanded the administrative order to the Environmental Board of Review for hearing and a determination on the merits. Thus, in spite of no notice and no prior hearing initially, on order of the Court of Appeals the petitioner is subject to two hearings and two determinations on the merits.

Pursuant to remand of the Court of Appeals in Case No. 73-874 now pending before the Supreme Court of Ohio, an administrative hearing was held on August 16, 1973, before a hearing examiner, over the objection of petitioner. On September 14, 1973, the hearing examiner recommended the issuance of a new emergency order under the provisions of § 6111.06 (C), Revised Code of Ohio.

Upon receipt of objections to the hearing examiner's

report and recommendations, the respondent, on October 2, 1973, issued his final findings and orders, which were revised in an order of October 10, 1973 (App. C, *infra*, pp. 57-60).

On November 1, 1973, petitioner filed its notice of appeal and application for stay with the Board. The Board denied the stay, without hearing, and on December 13, 1973, by majority vote, issued its final orders (App. B, *infra*, pp. 24-56).

The orders of the Board were appealed to the Court of Appeals for Franklin County, Ohio. On the basis of the record, the briefs and agruments of counsel, the Court of Appeals, on June 6, 1974, rendered a judgment affirming the orders of the Board and the respondent, which judgment is now before this Court.

HOW FEDERAL QUESTIONS PRESENTED

The questions here involved were first put in issue in the notice of appeal from respondent's order of July 9, 1973, to the Court of Common Pleas of Franklin County, Ohio, and in the appeal to the Environmental Board of Review, both taken on July 18, 1973. The issues were again raised before the Board and before the Court of Appeals for Franklin County, and again, in the petitioner's memoranda in support of jurisdiction in the Supreme Court of Ohio in Cases Nos. 73-874, 73-915 and 74-8, which are still pending before the Supreme Court of Ohio, and in Case No. 74-659, where the Supreme Court of Ohio overruled petitioner's motions to certify and dismiss, *sua sponte*, petitioner's appeal of right from the orders of the respondent as affirmed by the Board and the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I.

The Orders Of The Ohio Director of Environmental Protection Compelling Petitioner, A Public Utility Corporation Which Owns And Operates A Water Works System, To Permit A Municipal Government To Use Petitioner's Water Lines And System And To Prohibit Any Tampering With Or Hindering The Passage Of The Municipality's Water Through Such Lines And System, Takes Petitioner's Private Property Without Due Process Contrary To The Fourteenth Amendment To The Constitution Of The United States.

The Fourteenth Amendment to the Constitution of the United States protects private property from appropriation by a state without due process of law. *Cincinnati v. Louisville & Nashville R. Co.*, 223 U.S. 390, 56 L. Ed. 481, 32 S. Ct. 267; *Sayre v. United States*, 282 F. Supp. 175 (D.C., Ohio, 1967); *Bank of Toledo v. Toledo*, 1 Ohio St. 622 (1853); 19A O. Jur. (2d) 84, Eminent Domain, § 9; 2A Nichols on Eminent Domain (3rd Ed., 1970) § 7.31. The due process of law provisions of the Fourteenth Amendment require that there be a state law authorizing the exercise of the power of eminent domain. *Cincinnati v. Louisville & Nashville R. Co.*, supra. That just compensation "is an essential element of due process of law with respect to the taking of private property for public use, see *West v. Chesapeake & Potomac Telephone Co.*, 295 U.S. 662, 79 L. Ed. 1640, 55 S. Ct. 894.

The Fourteenth Amendment to the Constitution of the United States is a limitation upon the states and requires that provision be made for compensation where private property is taken for a public purpose *Norwood v. Baker*,

172 U.S. 269, 43 L. Ed. 443, 19 S. Ct. 187; *Cincinnati v. Louisville & Nashville R. Co.*, supra.

Respondent contends that he is authorized by §6111.17, Revised Code of Ohio, to regulate public water supply so as to protect public health. However, as shown by respondent's orders of July 9, 1973 (Appendix H) and October 10, 1973 (Appendix C), he did not act under the provisions of § 6111.16 and § 6111.17, Revised Code of Ohio. Rather, he proceeded under § 6111.06 (C), Revised Code of Ohio.

In 1908, the Ohio General Assembly enacted legislation controlling the quality and quantity of processed water for public consumption, which Act, with amendments, became § 6111.09 to § 6111.30, inclusive, of the Revised Code of Ohio (99 Ohio Laws 74). In 1951, the General Assembly adopted the Water Pollution Control Act of Ohio, consisting of §§ 6111.01 to 6111.08, inclusive, of the Revised Code of Ohio (124 Ohio Laws 855). The Water Pollution Control Act was designed to control, prevent and abate pollution of streams, lakes, ponds, water courses, wells and other surface or underground waters of the state. Although the two Acts, as amended by Am. Sub. S. B. No. 397, effective October 23, 1972, are now administered by a single agency, to-wit: Ohio Environmental Protection Agency, they persist in relating to different subjects (pollution of open water versus quality and quantity of processed public water supply) and in providing different administrative systems, both in authority and in procedure.

Although § 6111.06 (C) authorizes respondent, when he officially determines that an emergency exists requiring immediate action to protect the public health and welfare, to take immediate or summary action, such

right to take immediate action does not confer any jurisdiction higher than his statutory power or authority. § 6111.06 (C) does not authorize the respondent to issue any order to which he is not otherwise expressly or by necessary implication authorized to issue pursuant to law and especially § 6111.03, Revised Code of Ohio.

§ 6111.03, which is a part of the original 1951 Water Pollution Control Act, sets forth expressly and in great detail the precise powers possessed by the respondent. There is no authority, express or implied, in § 6111.03 for the respondent to compel a water works company to serve customers who have failed and refused to pay the lawful rates and charges for such water service.

Both by statute and case law, a public utility is obligated to charge and receive rates for services in accordance with its schedule of rates and tariffs on file with the Public Utilities Commission of Ohio. The statutory obligations are established by § 4905.32, Revised Code of Ohio, reading as follows:

> "No public utility shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time.
> "No public utility shall refund or remit directly or indirectly, any rate, rental, toll, or charge so specified, or any part thereof, or extend to any person, firm or corporation, any rule, regulation, privilege, or facility except such as are specified in such schedule and regularly and uniformly extended to all persons, firms, and corporations under like circumstances for like, or substantially similar, service."

Under this section, a public utility has no choice but to collect the rates set by the Public Utilities Commission.

State ex rel. Northern Ohio Telephone Co. v. Winter, 23 Ohio St. 6, 260 N.E. (2d) 827 (1970). Also see, *Suburban Power Co. v. Public Utilities Commission of Ohio*, 123 Ohio St. 275, 175 N.E. 202 (1931); *Keco Industries v. Cincinnati & Suburban Bell Telephone Co.*, 166 Ohio St. 254, 141 N.E. (2d) 465 (1957).

The respondent suggests that under §6111.17, Revised Code of Ohio, he has the power to regulate the public water supply so as to protect public health. However, by the express provisions of § 6111.17, after hearing, the respondent must first determine that improvements or changes are necessary and should be made. *Forest Hills Utility Company v. Gardner*, 31 Ohio St. (2d) 78, 285 N.E. (2d) 379 (1972). If he makes such a determination, then the respondent is authorized to notify the person owning or operating such water works system to make improvements, corrections, and changes in the location, protection, construction, operation, or maintenance of the water works system so as to prevent the contamination of the water supply. In the case at bar, the respondent did not, in his orders of July 9, 1973, or October 10, 1973, determine that improvements or changes are necessary and should be made.

Even had the respondent determined, in accordance with the provisions of the statute and the decision of the Supreme Court of Ohio in *Forest Hills Utility Company v. Gardner*, 31 Ohio St. (2d) 78, 285 N.E. (2d) 379 (1972) "that improvements or changes are necessary and should be made", which he did not, his sole power was to order petitioner to take the corrective action authorized by § 6111.17, Revised Code of Ohio. § 6111.17 does not authorize the respondent to cause a public utility to turn over its water lines and water system to

the City of Heath, Ohio, or any other municipality, without just compensation. § 6111.17 does not authorize the respondent to prohibit any employee, agent, officer or other person under petitioner's control from tampering with, damaging or in any way hindering the passage of water from the City of Heath water works through petitioner's system into the homes of petitioner's customers. § 6111.17 does not authorize the respondent to require a public utility to take such action as is necessary to assure that the incoming water from the City of Heath does not become contaminated in any way by the pipe lines or system of the utility. § 6111.17 does not, expressly or impliedly, empower the respondent to compel a water works company to serve customers who have failed and refused to pay the lawful rates and charges for such water service.

None of the powers which the respondent has taken upon himself in his orders of July 9, 1973, and October 10, 1973, are contained in § 6111.17, Revised Code of Ohio. Accordingly, the respondent has taken petitioner's property without just compensation and hence, without due process.

Even if respondent had ordered petitioner to make improvements in its water works system, which he did not, the public utility may not be required to make installation and improvements before such utility may claim and receive a just and reasonable rate for the services actually being rendered with its existing property and facilities. *Elyria Telephone Co. v. Public Utilities Commission*, 158 Ohio St. 441, 110 N.E. (2d) 59 (1958); *Forest Hills Utility Company v. Public Utilities Commission* 31 Ohio St. (2d) 46, 285 N.E. (2d) 702 (1972); *Forest Hills Utility Company v. Public Utilities*

Commission of Ohio, 39 Ohio St. (2d) 1 (1974); § 6111.23, Revised Code of Ohio. There is and can be no dispute that the revenues derived from the operation of petitioner's water works company is not sufficient to cover the expenses of making the improvements and changes previously ordered by the Public Health Council and by the Public Utilities Commission.

II.

The Orders Of The Ohio Director Of Environmental Protection Compelling Petitioner, A Public Utility Corporation Which Owns And Operates A Water Works System, To Serve Its Customers Who Have Failed And Refused To Pay The Lawful Rates And Charges For Such Water Service, Takes Petitioner's Private Property Without Due Process Of Law, Contrary To The Fourteenth Amendment To The Constitution Of The United States.

The orders of the respondent issued on July 9, 1973, and again on October 10, 1973, affirmed by the Board and the Court of Appeals, are overly broad. § 2 of said orders specifically read as follows:

> "2. Prohibit any employee, agent, officer or any other person under your control or authority from tampering with, damaging or in any way hindering the passage of water from the City of Heath water works into your system and into the dwellings of the residents of the Subdivision."

By the orders of the respondent, petitioner, regardless of reason, is prohibited from hindering the passage of water from the City of Heath water works through its system into the homes of petitioner's customers.

Although respondent bases his orders of July 9, 1973, and October 10, 1973, upon § 6111.06 (C), Revised Code of Ohio, such statute does not authorize respondent to

issue any order which he is not otherwise, expressly or by necessary implication, authorized to issue under § 6111.03. § 6111.03, which is part of the original 1951 Ohio Water Pollution Control Act, sets forth expressly and in great detail the precise powers of the respondent. There is no authority, express or implied, in § 6111.03 for the respondent to compel a water works company to serve customers who have failed and refused to pay the lawful rates and charges for such water service.

First Revised Sheet No. 7 and No. 8 of petitioner's water service tariffs on file with the Public Utilities Commission of Ohio since September 30, 1970, provide in pertinent part:

> "SVIII Included is a copy of the water rates. Meters will be read within 10 days prior to the end of each month. Bills shall be rendered monthly, by the 10th day following the end of the month. Bills shall be due and payable by the 20th day following the end of the month in which the account was incurred. Water will be shut off for nonpayment by the 25th day following the end of the month in which the account was incurred."

Original Sheet No. 3 and No. 4 of petitioner's sewer service tariffs on file with the Public Utilities Commission of Ohio since January 24, 1966, provide in pertinent part:

> "VII Non-payment of a sewer bill or any misuse of sewer system will be considered as reason for discontinuing water service and water utility rules will govern the turn-on agreement.
>
> * * *
>
> "IX The company undertakes to use reasonable

care and diligence to provide constant sewer service, but reserves the right at any time to shut off the mains or service lines for the purpose of making repairs or extensions, or for any other purposes. When the sewage service is to be temporarily discontinued for such purposes by the utility, it will give reasonable notice, to the extent practicable, to all customers to be effected by the discontinuance, stating the purpose for which the discontinuance is made and the probable duration of the interruption of service; provided that the company shall not be required to give notice of a discontinuance of service in the event of an emergency.

"X The utility shall not be liable to its consumers for any interruption in service, deficiency or failure of the sewage service, the bursting or breaking of any main, service lines, or any attachment to the mains or service lines, or any other facilities used by the utility or for any damage resulting therefrom, which occurrence is beyond the reasonable control of the utility."

Clearly, the respondent's orders of July 9, 1973, and October 10, 1973, make no provision for the termination of water service by petitioner's customers who refuse or fail to pay for such service.

Although several customers of petitioner testified at the administrative hearing, the testimony of Mrs. Mary Krieger is typical. She testified that she paid the monthly water and sewer charges of $39.06 from November, 1972, through March, 1973. Specifically, she testified as follows:

"Q. Right. And you paid the $39.06, then, from

December until about the first of April sometime through March at least?

"A. Un-huh.

"Q. Well, now, what is different, if you will tell the Hearing Officer—what is different about the bill that you were paying from December until April and the bills which you have been getting from April since then?

"A. Well, we just paid it, and I really feel it is wrong.

"Q. I see.

"A. It is a very deep moral issue with me, and I think it is very wrong to be charged this for what service we are getting."

To say that petitioner must not tamper with or in any way hinder the passage of water from the City of Heath water works into the homes of its customers, whether they pay or not, is the same thing as saying to this Court that you must judge but you won't be paid for it, or saying to counsel, you must accept a person as a client, and even if the client refuses to pay, you must continue to represent him.

That petitioner is under no obligation to provide water service to its non-paying customers is beyond dispute. See, *Jackson v. Metropolitan Edison Company*, 483 F. (2d) 754, 760 (C.A. 3, 1973), affirmed by this Court on December 23, 1974, in No. 73-5845; 43 Law Week 4110.

The respondent, rather than administering the laws with which he is charged, has chosen to place the authority of the State of Ohio on the side of petitioner's nonpaying customers, notwithstanding the fact that petitioner's rates and charges for sewer and water services are strictly in accordance with the orders of the Public Utilities Commission of Ohio, and the judgment

of the Supreme Court of Ohio. See, *Forest Hills Utility Company v. Public Utilities Commission*, 31 Ohio St. (2d) 46, 285 N.E. (2d) 702 (1972). Respondent thereby deprives petitioner of its property without due process of law contrary to the *Fourteenth Amendment* to the Constitution of the United States.

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,
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APPENDIX "A"

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

No. 73AP-487

FOREST HILLS UTILITY COMPANY,
Appellant-Appellant,

v.

IRA L. WHITMAN,
Director of Environmental Protection,
Appellee-Appellee.

DECISION
Rendered on May 21, 1974

LUCAS, PRENDERGAST, ALBRIGHT,
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REILLY, J.

Appellant's notice of appeal is the following:

"Forest Hills Utility Company, appellant herein, hereby gives notice of its appeal to the Court of Appeals

of Franklin County, Ohio, from the following orders of the Environmental Board of Review:

"1. Order of November 8, 1973, denying appellant's motion for stay of the orders dated October 2, 1973, and October 10, 1973, of the Director of Environmental Protection;

"2. Findings of Fact and Final Order dated December 13, 1973, affirming the orders of the Director of Environmental Protection.

"This appeal is taken pursuant to the provisions of § 3745.06, Revised Code."

The record shows that appellant conducts a water supply system serving Forest Hills, a residential area of the city of Heath. Appellant is an Ohio corporation functioning as a waterworks and sewage disposal company within R. C. 4905.03(8) and (14) respectively. It has supplied water and sewage disposal services in the Forest Hills subdivision since 1965 (Tr-177). The system appears typical of such utility services in its general category. It consists of two 8-inch wells. One is 216 feet deep, and the other 220 feet deep (Tr-178). Each well is pumped with a 5½ horsepower motor capable of pumping 90 gallons per minute each (Tr-178). Water is pumped through the lines into a 1500-gallon storage tank (Tr-179, 236). There are two pressure valves, one for each of the pumps. The pressure valve for one is set to kick on at 50 pounds; the other at 55 pounds (Tr-179). The peak demand for water in the subdivision is approximately 250 gallons per minute. When the system operates at maximum-rated capacity, it would pump 180 gallons per minute (Tr-178-179). The water supply system needs elevated storage. The mini-

mum amount of elevated storage capacity necessary for appellant's system is 50,000 gallons (Tr-151).

This case was triggered by an episode which occurred July 8, 1973, when, at about 11:45 p.m., appellant's president was notified by an employee that the pumps had been kicking off all afternoon; that he had been resetting them, but that they wouldn't reset (Tr-181). He said he had tried to reach the electrician and pump repairman, but without success (Tr-182). The following afternoon appellant's pumps were operating (Tr-185). In any event, it is not disputed that improvements are needed in this water supply system (Tr-190). This has been apparent since 1971 (Tr-189).

Moreover, the record shows there was the potential of contamination of the water supply, caused by back-syphonage. This occurs when the presure in the water supply system becomes low enough to allow contaminated water to be drawn back into the system. Thus, inadequate pressure in a water supply system can reasonably be deemed a health hazard (Tr-139, 151). The pressure in appellant's system was low enough to cause back-syphonage at the time of a visit, July 9, 1973, by Curtis Ridenour, a professional engineer who supervises water supply regulation for the state in the southeast quadrant of Ohio (Tr-138). The record, however, does not show that contaminated water actually entered the system.

Subsequently, the hearing examiner, the Director of Environmental Protection, and the Environmental Board of Review, found that appellant's system was inadequate to provide safe water, and ordered appellant to allow water provided by the city of Heath to flow into Forest Hills, until appellant could provide an adequate system.

Appellant filed its notice of appeal and application for stay of execution with the Environmental Board of Review. The board denied the stay, without hearing. Whereupon, the board issued its final order.

Appellant perfected this appeal, and now advances the following assignments of error:

"I. The Environmental Board of Review Erred In Denying Appellant's Motion For Stay Of The Orders Of The Director Of Environmental Protection, Dated October 2, 1973, And October 10, 1973

"II. The Director Of Environmental Protection Is Not An 'Agency' Within The Meaning Of § 119.01 (A), Revised Code, And Thus, Having No Authority To Appoint A Referee, Under § 119.09, Revised Code, A Hearing Before A Referee Appointed By The Director Of Environmental Protection Is A Nullity, Consequently The Environmental Board of Review Erred In Affirming An Order Based On Such A Hearing

"III. The Board Erred In Finding That The Director Of Environmental Protection Had Authority to Reconsider And Amend His Order Of October 2, 1973

"IV. The Board Of Environmental Review Erred In Finding That The Director Of Environmental Protection Has Authority To Issue Orders Requiring A Public Utility To (1) Immediately Allow Water From The City Of Heath To Flow Through Its Water Lines; (2) Prohibiting Any Tampering With Or Hindering The Passage Of Water From The City Of Heath Through Its

Water Lines; (3) Continue To Assure That The Incoming Water From The City Of Heath Does Not Become Contaminated In Any Manner By The Water System of Appellant; And (4) Continue To Permit The Flow Of Water From The City Of Heath Through Appellant's Pipe Lines Until The Director Otherwise Determines

"A. Administrative Officers Have Limited Powers

"B. The Appellee's Supervisory Powers Over Public Water Supply."

This appeal, as indicated above, is within R. C. 3745.06 which, in pertinent part, is as follows:

> "The court shall affirm the order complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. * * * "

Further, we note R. C. 6111.17, in relevant part, to wit:

> " * * * if the director of environmental protection determines that improvements or changes are necessary and should be made, the director shall notify the mayor or managing officer or officers of the municipal corporation, county, or public institution or the person owning or operating such water supply or water-works system to make improvements, corrections, and changes in the location, protection, construction, operation, or maintenance of the water supply or water-works system satisfactory to the director, so as to prevent the contamination of the water supply or to provide a water supply not subject to the danger of contamination, or to provide a water supply and water-works system adequate to avoid endangering the public health. * * * "

For perspective, the following facts are summarized.

The director determined, after a hearing, that appellant's water supply system was inadequate, and ordered appellant to develop a water supply which was not subject to contamination. Meanwhile, appellant was ordered to allow water from the city of Heath to go through its pipes. In essence, the order required appellant to provide a safe water supply. The director found that the evidence at the hearing established that the water supply system was inadequate to reliably supply uncontaminated water, and that a safe water supply was readily available until appellant's system was improved. Thus, although it is not directly raised by assignment of error, the order of the Environmental Board of Review is in accordance with law.

Therefore, since the director's order was within his statutory authority and in accordance with law, there was not an abuse of discretion in denying the stay order. We recognize the difficulties involved for a small utility service, but respectfully note that the request for a stay was not actually supported by facts showing compelling reasons for granting such an order. Therefore, appellant's first assignment of error is not well taken and is overruled.

Appellant's second assignment of error is also not well taken. There is not a showing of damage to the interests of any party by the appointment of a hearing examiner. A review of pertinent code sections indicates that virtually every duty of the Ohio Environmental Protection Agency is assigned to the director. It would be a practical impossibility for anyone to personally conduct all such functions. Hence, there is a manifest necessity, under proper circumstances, to use referees. Doubtless, the final responsibility for each statutory duty rests upon the

director. The General Assembly, however, did not expect that person to perform each duty personally. *Bell v. Bd. of Trustees* (1973), 34 Ohio St. 2d 70. Consequently, appellant's second assignment of error is overruled.

As to appellant's third assignment of error, the record indicates that the director's initial order was not relied upon to the detriment of any party. It was promptly corrected. Thus, there was no prejudice to appellant, and the third assignment of error is also overruled.

Coming finally to appellant's fourth assignment of error, as indicated above, there is not a showing of a material dispute concerning the facts in the record. Further, the director's actions were plainly within his statutory authority. In brief, the order to require a water supply system to provide service consistent with the requirements of public health, in the absence of prejudicial procedural violations, is not prejudicial error. Consequently, appellant's fourth assignment of error is overruled.

Accordingly, for the foregoing reasons, the orders of the Environmental Board of Review are affirmed.

TROOP, P. J., and HOLMES, J., concur.

APPENDIX "B"

BEFORE THE ENVIRONMENTAL BOARD OF REVIEW STATE OF OHIO

Case No. EBR 73-28

FOREST HILLS UTILITY COMPANY,
Appellant,

v.

IRA L. WHITMAN,
Director of Environmental Protection,
Appellee.

FINDINGS OF FACT AND FINAL ORDER

I

On November 1, 1973, the Appellant filed its Notice of Appeal from orders of the Director of Environmental Protection dated October 2, 1973 and October 10, 1973. On November 2, 1973 the Board ordered certain amendments in the Notice of Appeal in compliance with sec. 3745.04 of the Revised Code and EBR-§ 3-02 and EBR-§ 3-05 (D), which were complied with by the Appellant on the same day. The Appellant on November 1, 1973 had also filed an Application for Stay of the Director's orders (amended at the request of the Board on November 2, 1973). On November 5, 1973, the Board reserved their decision on the Amended Application for Stay

and set the hearing, having assigned the appeal its individual case number, for November 27, 1973.

On November 6, 1973, the Board received a Memorandum from the Director opposing the Appellant's Motion for Stay as not meeting the requirements of EBR-§ 3-10 (A) and the requirements generally applicable to the issue of stays in the case of administrative orders. On November 8, 1973 the Board denied the Amended Application for Stay (treating it as a Motion for Stay under EBR-§ 3-10) on the basis that a naked assertion of undue hardship does not sustain the burden upon the Appellant since sec. 3745.04 requires that stays not be automatically granted: nor did the Motion provide a sufficient basis to order an oral argument on the issue of stay.

At the hearing, the Appellant expressed an objection that no hearing had been granted on the issue of stay, *Transcript of November 27, 1973*, p. 7, stating: "I am not saying the hearing would be any different from what I am saying right now, but without hearing, I think, is something that shouldn't be done." The Board took no further action on the Amended Application for Stay since it was not renewed at the hearing. The denial of the stay by the Board has remained in effect. At no time since the Board's denial on July 30, 1973 (*Transcript of July 30, 1973*, pp. 62 *et seq.*) of the Appellant's Motion for Stay in the earlier case of *Forest Hills Utility Co. v. Whitman*, EBR 73-20, (this denial following a hearing on the Motion for Stay, having been issued as a separate order of the Board on August 9, 1973) has the Board been of the opinion that any compelling reasons have been shown the Board for the grant of a stay in this appeal. Nothing adduced at the hearing of November 27, 1973 has led the Board to alter this opinion.

II

The orders of the Director of October 2, 1973 and October 10, 1973 followed a hearing held before a Hearing Examiner on August 16, 1973. This hearing was pursuant to a decision of the Franklin County Court of Appeals, *Forest Hills Utility Co. v. Whitman,* 73AP-277, rendered August 7, 1973. Following the hearing, the Hearing Examiner made a recommendation to the Director on September 14, 1973. The Director entered his Final Order on October 2, 1973 and followed it with his order of October 10, 1973. The Director's reasons for this are set out in a letter to the Appellant dated October 10, 1973, which is not a part of the certified record but which is attached to the Appellant's Amended Notice of Appeal. The Franklin County Court of Appeals has determined that this Board has the jurisdiction to review the orders of the Director entered by him under sec. 6111.06 (C) and secs. 6111.18, etc. of the Revised Code, *Forest Hills Utility Co. v. Whitman,* 73AP-306, rendered October 16, 1973, Slip Opinion, p. 8; Motion for Reconsideration Denied, rendered November 6, 1973, Slip Opinion, p. 2; and Judgment Entry, November 13, 1973. On the basis of the above, the majority of this Board concludes that the Board has jurisdiction to hear this appeal.

It is set out in the Amended Notice of Appeal that the Director's orders of October 2 and October 10, 1973 are contrary to law in that the Director is not an "agency" within the meaning of sec. 119.01 (A) of the Revised Code; that the Director had to personally conduct any hearing held in response to the decision of August 7, 1973 of the Franklin County Court of Appeals; that the Director had no authority to amend his order of October

2, 1973 by his order of October 10, 1973; that the Director has no power to issue an emergency order concerning public water supply; that the Director has his sole powers over public water supply under secs. 6111.16 and 6111.17 of the Revised Code; that Chapter 119 of the Revised Code is not applicable to those sections; and that "the orders are unlawful in that they assume, as stated in the last paragraph of the findings of each, that such findings and orders are issued under the substantive powers of the Director as specified in secs. 6111.12 through 6111.30, and in accordance with the procedure specified in sec. 6111.06 (A), Revised Code," Amended Notice of Appeal, pp. 2-3. The Board at the hearing of November 27, 1973 heard arguments on these points from counsel for both parties.

The Board must observe that at various times in these proceedings, which go back to an order of the Director of July 9, 1973, four different statutes have been referred to: sec. 6111.12 through 6111.20 of the Revised Code (originally an act of July 8, 1908, 99 *Ohio Laws* 74) referred to in the order of July 9, 1973; sec. 6111.06 (C) (originally part of an act of September 27, 1951, 124 *Ohio Laws* 855), referred to in Appellant's Application of August 9, 1973 for a hearing before the Director and in the orders of October 2 and October 10, 1973; Chapter 119 of the Revised Code, referred to in the order of July 9, 1973 (only there as to sec. 119.06 (C)), the order of October 2, 1973, and the order of October 10, 1973; and sec. 3745.05, referred to in the order of July 9, 1973. Each of these statutes has been relied upon by the Director to justify his actions in ordering the Appellant to receive water through its pipelines furnished by the City of Heath rather than to supply the water from the Appellant's own source; but is the position of

the Appellant that, despite this apparent wealth of statutory powers, the Director is without authority to order what he has ordered in this case, and this Board should vacate his orders.

III

The first question the Board must address is the precise order of the Director which is under appeal. The Appellant alleges that it has appealed both the order of October 2, 1973 and of October 10, 1973; but that the Director was without power to issue the order of October 10, 1973. It is the opinion of the Board that the Director did have power to issue the order of October 10, 1973; that it replaced for all purposes his earlier order of October 2, 1973; and that the only order on appeal to this Board is the order of October 10, 1973.

The Director, acting under the adjudicatory powers assigned him under sec. 3745.05, issued the order of October 2, 1973. On October 3, 1973, he was moved by the Attorney General to clarify this order. This was intended to serve as a motion for the Director to correct a clerical error in the order of October 2, 1973. *Transcript of November 27, 1973*, remarks of Mr. Segreti, p. 50. The Appellant is of the opinion that there is no clerical error patent on the face of the order, that the order of October 2, 1973 is an understandable and compliable order on its face, and that the power to correct clerical error does not extend to the power of the Director to issue a new, revised order. *Ibid.*, remarks of Mr. Gibson, pp. 51-53. The Director has responded to the Attorney General's motion of October 3, 1973 by issuing the order of October 10, 1973 and by sending to the Appellant a letter of October 10, 1973 which stated,

in part: "The Director's Final Findings and Orders in the matter referenced above which were transmitted to you on October 2, 1973, contained a clerical error. Transmitted herewith are corrected Final Findings and Orders in this matter."

At the hearing of November 27, 1973, no evidence was offered by the Director to support this allegation; but counsel for the Director offered to make available to the Board the official responsible for the clerical error either by deposition (under EBR-§ 4-12) or by a continued hearing (under EBR-§ 4-09 (A)). He would not be willing, however, to provide an affidavit (under EBR-§ 4-11) to the same effect, *Transcript*, remarks of Mr. Segreti, p. 50, p. 54, p. 63. The Board reserved the issue as to whether or not it would call for another hearing or for a deposing of the witness on the question of how the order of October 2, 1973 came to be written as it was, *Ibid.*, pp. 58-59.

The Board has carefully examined the language of the orders of July 9, 1973, October 2, 1973 and October 10, 1973. At the hearing, Chairman Murphy found the language of the October 2nd order clear, *Ibid.*, p. 49, whereas Mr. McCutchen stated that to him it appeared unclear because it seemed words had been omitted, *Ibid.*, pp. 50-51. A re-examination of the three orders indicates the correctness of Mr. McCutchen's analysis.

While the order of October 2, 1973 might appear at first reading to be complete and compliable on its face, it is evident that it was meant to be an up-dating of the precise language of the order of July 9, 1973. The typist's eye probably slid over the intervening lines between the references to the "City of Heath water works" which appears in both orders 3 and 4 in the order of July 9,

1973. When the motion of the Attorney General of October 3, 1973 induced a re-reading of the order of October 2, 1973 in the offices of the Director, this elision was caught and in the order of October 10, 1973, it was corrected. The Board, therefore, concluded that it was not necessary to either depose the responsible official or to continue the hearing to hear his evidence on this point.

It is the conclusion of the majority of the Board that the order of October 10, 1973 is not a revised or reconsidered order. It is instead an order intended to add material inadvertently left out by a typist's mistake. As such, it is a clerical error which is being corrected; and, even on a *nunc pro tunc* basis, this could be done in this manner. This Board recently has considered the issue of what constitutes clerical error and what the limits of a *nunc pro tunc* correction are, *Bevacqua v. Whitman, et al.*, EBR 73-24, decided November 27, 1973; and the order of October 10, 1973 meets the requirements (except for the 30-day appeal period under sec. 3745.04 which must run from October 10, 1973) of *nunc pro tunc* correction of clerical error. If an administrative agency may go so far as to reconsider its action "and adopt if need be the opposite course in all cases in which no vested right of others has intervened," *State, ex rel. Cleveland Trinidad Pavement Co. v. Board of Public Service of Columbus*, (1909), 81 O.S. 218, 90 N.E. 389, at 391, then an administrative agency, intent only on correcting a clerical error, promptly brought to its attention by the Attorney General and done both before any action could be taken in reliance thereon and the time for appeal had expired, is well within its rights. The correction in the order of October 10, 1973 is properly done; this is the order of the Director from which the

appeal is taken; and the thirty-day appeal period of sec. 3745.04 runs from the date of this order, since the Director chose to issue a new rather than *nunc pro tunc* order.

IV

The next issue is whether or not the Director is an "agency" within the meaning of sec. 119.01 (A) of the Revised Code. This statute provides three ways for subjecting an agency to its terms:

(a) The agency is specifically listed;

(b) The Agency is made specifically subject to Chapter 119; or

(c) The Agency is possessed of "licensing functions." The term "license" is defined by sec. 119.01 (B) as "any license, permit, certificate, commission, or charter issued by any agency." It is the opinion of the majority of this Board that the Director is subject to the reach of Chapter 119.

First of all, one must observe that the General Assembly has never amended sec. 119.01 (A) to include the Director among the specifically listed agencies of the state that are subject to Chapter 119. Secondly, sec. 3745.05, while it does not make the Director expressly subject to Chapter 119, provides in part that, " * * * if an adjudication hearing was conducted by the director of environmental protection in accordance with sections 119.09 and 119.10 of the revised code" and " * * * if no adjudication hearing was conducted in accordance with sections 119.09 and 119.10 of the revised code * * *," then certain consequences will follow on appeal to this Board. Secs. 3745.01, 6111.13 and 6111.44 give the Director general supervision over public water supply. This falls short of an express subjection of the Director to

the full sweep of Chapter 119 though it does seem to require him to follow on adjudications secs. 119.09 (which expressly includes sec. 119.07) and 119.10. Thirdly, sec. 6111.03 (A) enumerates only certain sections of Chapter 6111 as being subject to Chapter 119, thus seeming to not include the sections not therein listed.

Yet we believe that the Director in matters of regulating public water supply is subject to Chapter 119. It is provided in sec. 6111.44 that all public water supply systems must procure the approval of the Director. One might argue that such plan approval of public water supply systems is the administering of a "licensing function" as called for by sec. 119.01 (A) in its third criterion for bringing an agency under Chapter 119. Since sec. 119.01 (B) in part defines the word "license" by referring to the same word, the necessary resort to a standard legal dictionary, *Black's Law Dictionary* (4th ed., 1951) p. 1067, shows that "license" means "the document itself," "permission or authority." The author then follows this with the ensuing definitions: "permission by some competent authority to do some act which, without such permission, would be illegal"; "permission to do a particular thing, to exercise a certain privilege or to carry on a particular business or to pursue a certain occupation"; and "to 'license' means to confer right or power which does not exist without it." The definitions in 34 *O. Jur. 2d*, "Licenses and Permits," sec. 2, are to the same effect.

Although the words "license," "certificate," "permit," "commission," and "charter" do not appear in sec. 6111.44, it may be that the Director represents the "competent authority" without whose permission the opera-

tion of a public water supply would be illegal; that the plan approval is "permission to carry on a particular business"; that the approval "confers a right or power which does not exist without it"; and that the marking up of approval on the plans, as provided by HE-33-04 (G), is "the document itself" that is the license, all as provided by the terms of the definition in *Black's* based on long-decided cases. The carefully examined definition of license in *Village of Mogadore v. Coe, et al.* (C. P. Summit Cy., 1963), 197 N.E. 2d 570, at 573-574 would be in accord with this interpretation.

The general supervision assigned to the Director over public water supply under sec. 3745.01 and sec. 6111.13 and his mandate under sec. 3745.011 (C) to "administer the air, water, and other natural resources of the state for the use and benefit of the people of the state," as well as his plan approval duties under sec. 6111.44, may confer upon the Director the "licensing functions" relative to water supply which bring him under Chapter 119. If so, he would be required to employ the provisions of Chapter 119 in making available adjudicatory relief to persons operating businesses subject to his supervision, approval, modification, and discipline under Chapter 3745 and 6111, as is the Appellant in this case. But the majority of this Board has not reached the conclusion that "plan approval" as provided by sec. 6111.44 makes the Director an "agency" under sec. 119.01 (A), as to its third criteria, merely because the meaning of "license" under sec. 119.01 (B) might include the type of plan approval required by sec. 6111.44. It may be, but the Board at this time has no reason to decide either way upon the issue.

The majority of this Board believes that the language

of secs. 3745.01, 3745.011, and 6111.44 must be considered in conjunction with the provision of sec. 6111.13 that speaks of the Director's "general supervision of the operation and maintenance of the public water supply and water works systems throughout the state." Chapter 6111 is a mosaic of statutes, going back to at least 1908 and to even as early as an Act of May 7, 1869 when one traces out the origins of the 1908 legislation. But the General Assembly meant the Director to read them along with Chapter 3745 as an integrated, comprehensive authority over the public water supply in Ohio as is evidenced by the language of secs. 3745.01 and 3745.011. Even counsel for the Appellant states that concerning the Director's being generally under Chapter 119, that " * * * they are not an agency for the purposes of Section 6111.11 or 6111.12, or whatever it is, from there on, * * * ", *Transcript of November 27, 1973*, remarks of Mr. Gibson, p. 34.

V

The majority of the Board are of the opinion that, even if Chapter 119 does not apply to secs. 6111.12 through 6111.20, the order of the Director of October 10, 1973 is still lawful and reasonable. The Appellant asserts that the Director is without power, as opposed to the power he would have under sec. 119.09 as incorporated by sec. 3745.05, to appoint a Hearing Examiner under sec. 6111.16 and that he must hear causes under these particular sections of the Code himself in person. In a case favorably cited in Davis, *Administrative Law* (3rd ed., 1972), p. 244, the District of Columbia Court of Appeals, a court much experienced with administrative law questions, said: " * * * the broad ideal that agency heads should do personally what they purport

to do is for many functions impractical and unworkable * * *," *Braniff Airways v. CAB* (1967), 126 App. D. C. 399, 407; 379 F. 2d 453. This has become a part of the whole problem of the necessity for institutional decision-making in an agency such as the Director's where the number of his employees runs in the several hundreds.

The State of Ohio has clearly put itself in this national rule in the recent case of *Bell v. Board of Trustees of Lawrence County General Hospital* (1973), 340 S. 2d 70. In that case, the Court of Appeals had found it "improper" to appoint hearing examiners in the absence of express statutory authority to do so and said, ". . . public duties must be performed and governmental powers must be exercised by the officials or body designated by law . . .", quoted at p. 73. In commenting on this language, the Ohio Supreme Court said: "If applied literally, that would foreclose public administration and cripple the ordinary operation . . . In the operation of any public administrative body, subdelegation of authority, impliedly or expressly exists—and must exist to some degree," pp. 73-74. The statutes under interpretation in that case are similar to those here and it can be said of secs. 6111.12 through 6111.20 that ". . . The authority to conduct a hearing may be delegated, but the ultimate decision lies in a higher authority. The board of trustees retained the power to adopt or reject, in whole or in part, the findings of the hearing officers and made the final decision . . .," p. 76. This was what the Director did in this case and it is clear this is the rule of his agency for the Director to retain such power of final decision upon the receipt of recommendations from his Hearing Examiner, EP-40-14 (F), EP-40-24 (A), EP-40-25 (B), and EP-40-26 (B). Under the authority of *Bell v. Board, supra,* both the general procedures of

the Director in this regard and his actions in this case are lawful.

We believe that, whatever the general rule permitting a statutorily burdened administrator to share the responsibility of a caseload with hearing examiners, secs. 6111.16 through 6111.19 impose no personal hearing obligation upon the Director. For example, sec. 6111.16 states in part, "When the director of environmental protection finds, upon investigation, that a public water supply is subject to the danger of contamination * * *," there is absolutely no reason to believe it means the Director should personally conduct the field or laboratory aspects of that investigation. Rather, it means that he should order such an investigation by his staff. The notice he is required to send out also does not require his personal action but may be delegated to a subordinate clerk. Sec. 6111.17 provides in part, "After the hearing provided for in section 6111.16 of the revised code, if the director of environmental protection determines * * * " certain changes need to be made, the Director shall "notify" parties of them. Again there is the clear implication that the hearing need not be conducted by the Director personally. The same is true of the language in secs. 6111.18 and 6111.19 which puts the Director's finding and determination subsequent to hearing and says nothing about a personal requirement in the Director to hear the cause.

As Professor Davis points out, it is simply no longer the law that "The one who decides must hear," Davis, *op. cit.*, sec. 11.01. See also *Bell v. Board, supra.* There is nothing in the language of this particular statute that would indicate it should be applied by the Director in any manner different from the national law norm in

administrative cases. Nor does this Board find anything in the language of the Franklin County Court of Appeals in *Forest Hills Utility Co. v. Whitman*, 73AP-277, rendered August 7, 1973, to indicate that the Director personally was to hear the case and was statutorily or by court order prohibited from assigning the hearing of it to one of his Hearing Officers.

The majority of the Board is of the opinion that when the Director allowed the emergency order of July 9, 1973 to lapse after September 10, 1973, he was without power to continue or modify it. This position we believe was correctly stated by the Attorney General in the Notice of Time Constraints of September 5, 1973 and the letter of September 6, 1973 from Assistant Attorney General A. Marl Segreti, Jr., to Mr. Harvey Rosenzweig, Chief Hearing Examiner of the Ohio EPA. When the Hearing Examiner ignored this and recommended the issuance of another emergency order under sec. 6111.06 (C), we believe that the Attorney General was correct in his Objections to that report made September 21, 1973, insofar as they related to the power of the Director to issue another emergency order.

But we must point out that the Director acceded to the objections of the Attorney General and did not issue another emergency order. Instead, the Director issued the sort of permanent order he was empowered to issue under sec. 6111.18, etc., which had been specifically mentioned as one of his alternate courses of action by the Franklin County Court of Appeals in *Forest Hills Utilities Co. v. Whitman*, 73AP-306, decision rendered October 16, 1973, Slip Opinion, p. 8.

In an earlier opinion considering Chapters 119, 2506, and 3734 of the Revised Code as to their hearing pro-

visions, the Board, after a careful consideration of English precedents, concluded that these were statutes simply declarative of the common law, *Mahoning Landfill, Inc. v. Board of Health, Mahoning County General Health District,* EBR 73-5, decided May 15, 1973, pp. 7-8 of our opinion; and that these statutes conferred no more rights upon parties than the parties already possessed namely the rights of notice, fair hearing, counsel, and fair judgment. It is the opinion of the majority of the Board that secs. 6111.16 through 6111.19 are in a similar category of statutes providing parties in statutory language no more rights than they would have had at common law. Of course this Board has no opinion as to what their rights to fair hearing may be constitutionally; but secs. 6111.16 through 6111.19 seem clearly declarative of the common law.

As such, the majority of the Board believes that the Appellant received from the Director the procedure and consideration to which the statutes of Ohio entitle it. The order of July 9, 1973 apprised the Appellant of the Director's opinion of the statutes involved and constituted notice of what the Director regarded to be the basis of his action. The hearing held on August 16, 1973 gave the Appellant ample opportunity to hear the case the Director's staff and that of the Health Commissioner of Licking County had marshalled, to observe the witnesses who testified against the Appellant, to cross-examine these witnesses and to challenge the reports of the Director's investigators and of the Health Commissioner of Licking County, and to introduce any witnesses the Appellant chose to call upon its own behalf.

If fairness consists of notice, representation, and hearing, the Appellant received this fairness from the Direc-

tor; and in entering his order, the Director, in the opinion of a majority of the Board, acted both lawfully and reasonably in arriving at a fair judgment. The hearing held on November 27, 1973 and the record certified to this Board by the Director have enabled this Board to make a determination of the lawful and reasonable character of the proceedings before the Director and of his actions arising out of those proceedings. The majority of the Board, on the basis of that certified record and the hearing of November 27, 1973, concludes that the proceedings and actions of the Director were lawful and reasonable; and the Director ordered a hearing held under due process requirements imposed when hearings are delegated to hearing officers under *Bell v. Board*, *supra*, at p. 73.

It is the contention of the Appellant, *Transcript of November 27, 1973*, remarks of Mr. Gibson, p. 27, that the Director is without power to issue an order under secs. 6111.16 through 6111.19 that does not specify in detail what the owner of a public water supply is to do to correct defects and that the Director could not order the Appellant to receive the water of the City of Heath, *Ibid.*, p. 28. The majority of the Board does not agree with this construction of these statutes.

These statutes give to the Director several alternative kinds of actions. Sec. 6111.17, among other alternatives, empowers the Director to "notify * * * the person owning or operating such water supply or water-works system * * * to provide a water supply not subject to the danger of contamination, or to provide a water supply and water-works system adequate to avoid endangering the public health." Sec. 6111.19 provides in part, among other alternatives, that the Director

"* * * shall notify the * * * person owning or operating such water supply or water-works to change the source of supply * * *, or to change or enlarge existing water purification or treatment works in a manner satisfactory to the director." HE-37-01 (K) defines a water supply works to mean "any facilities for public water supplies * * * including, source of supply, treatment, storage, pumping or distribution of water to be used for human consumption." HE-34-01 (T) indicates that public water system means only a system that distributes potable water as defined by HE-34-01 (R), which makes storage adequacy, so as to prevent backflow or outage, an integral part of treatment. In the light of these long-established regulations and statutes, Order No. 4 in the Director's order of October 10, 1973 seems squarely within the scope of the statutory alternatives available to the Director.

This order provides that the Appellant is to "Continue to authorize, permit and allow the flow of water from the City of Heath water works into the Forest Hills Utility Company pipelines and into the dwellings in said subdivision until the Director determines (1) that the Forest Hill [sic] Utility Company has instituted a public water supply with adequate pressure and sufficient quality and quantity to protect the public health; and (2) that there is no threat of contamination and/or inadequacy of the public water supply." Greater specificity is not required by the statutes. Under these statutes, the Director is specifically authorized to require the supplier of public water either to "provide a water supply not subject to the danger of contamination," sec. 6111.17, or to "change the source of supply," sec. 6111.19. By requiring the Appellant to open its lines to water from the City of Heath and to close off its own sources so as not to

contaminate that water, this is precisely what the Director has done. His action is within the statutory mandate.

Even if Chapter 119 is not applicable, because of sec. 6111.06 (A), to secs. 6111.12 through 6111.20, the Director has conformed with the requirements for notice and hearing and judgment contained within secs. 6111.12 through 6111.20, especially secs. 6111.16 through 6111.19, themselves. His own order of July 9, 1973, the decision of the Franklin County Court of Appeals rendered on August 7, 1973 (73AP-277), the hearing held on August 16, 1973, the findings and recommendations contained within the report of September 14, 1973 of the Hearing Examiner, and the Director's own order of October 10, 1973 amply provided fair notice, hearing, and judgment. To order a *de novo* hearing at the level of this Board, which the majority of the Board does not believe they have the authority to do under sec. 3745.05; or to send this cause back for an *ab initio* proceeding, as if no investigation, notice, or hearing had ever been held, is not required by the law and would not conform with justice. Whether viewed under the requirements of Chapter 119 and sec. 3745.05 or only of secs. 6111.12 through 6111.20, the Appellant has been dealt with lawfully and reasonably by the Director, most particularly since the decision of the Franklin County Court of Appeals rendered on August 7, 1973 (73AP-277).

VI

The Appellant insists, *Transcript*, remarks of Mr. Gibson, pp. 61-62, that the events leading up to the issuance of the Director's order of July 9, 1973 are " * * * really not relevant to the issue before this Board, and, in fact, the orders of the appellee still talk about the emergency, and an emergency is no longer the issue."

The Appellant, *Ibid.*, pp. 62-63, insists that such outages as then occurred, when measured against service since 1965, do not justify such an order as the Director issued on October 10, 1973. The Appellant by counsel says: "It is the same system, the same number of customers, the same wells, the same as it has been all these years, so that [if] the determination of the Director is right, it has been inadequate since the day one, and they have lived with an inadequate water supply since 1965," *Ibid.*, pp. 62-63.

Though there is not sufficient evidence in the record of the hearing before the Hearing Examiner that would support a finding of an inadequate system "since the day one," there is ample and unrebutted testimony of an inadequate system for many years in the evidence before the Hearing Examiner and in his findings based upon that evidence. The events leading to the order of July 9, 1973 merely evidenced that long-existing inadequacy; and the Director's order of October 10, 1973 is not based upon any emergency character of the episode just prior to July 9, 1973 but upon the underlying basic condition of the water supply system of the Appellant which this revealed. This is made clear by Finding No. 5 in the order of October 10, 1973 which states:

> "The hearing examiner in his report cited numerous instances of hardship to individual residents of the subdivision and of danger of public health arising from inadequacy of the water supply, and concluded that 'as a result of the inadequacy of said water supply, the public health of the area and the health of individuals in the area is endangered in such a manner as to constitute a health emergency.'"

The "health emergency" here is not the episode just prior

to July 9, 1973. It is the protracted, continuing inadequacy of the system of the Appellant which will remain a danger to its users until the Appellant can remodel it to provide a "sufficient quality and quantity" of water "with adequate pressure," Order No. 4 in the order of October 10, 1973.

Interesting as the legal and administrative issues are in this case, this Board cannot overlook the fact that we are dealing with a matter of the gravest concerns of public health. This is shown by an examination of the transcript of the hearing of August 16, 1973. Assuming that the Appellant is operating a Class I public water supply works, HE-37-06 (C) (3) (a), it has been found by the Director in his order of October 10, 1973, Finding No. 1, that it serves over 250 persons which brings it under the coverage of HE-37-02. As such the operator need not be a full-time person, HE-37-02 (B). Even so, however, Class I public water supplies are required to be adequate to their needs; and the evidence before the Hearing Examiner indicates that this one is not.

The testimony of Mr. Curtis Ridenour, Civil Engineer, Chief, Water Supply Group, Southeast District Office, of the Ohio EPA, is particularly supportive of the findings of the Hearing Examiner and of the Director, *Transcript of August 16, 1973*, pp. 131, *et seq.* He testified on direct examination that the Appellant's system supplied about 48,000 gallons per day which provided over the 16-hour daily demand period about 50 gallons per minute, *Ibid.*, p. 144. The peak daily demand, however, was three to five times that average, *Ibid.*, p. 145. There are two pumps, each capable of pumping 90 gallons per minute, *Ibid.*, 148, although the construction specifications called only for 71 gallons per minute and it is "not

uncommon for pumps to only produce at 50 to 55 percent of their rated capacity," *Ibid.* At peak periods he testified that the pumps would fall at least 60 gallons per minute short of meeting the demand, with resultant overheating which would cause the system to shut down, *Ibid.*, p. 149. He outlined how this would lead to contamination of the water supply, *Ibid.*, p. 150, and testified that the 1,000-gallon pneumatic tank is only a "buffer to give pressure" and that, "The system sorely needs elevated storage, and the capacity of a minimum of 50,000 gallons," *Ibid.*, p. 151.

On cross-examination, Mr. Ridenour testified that the pumps normally would work alternately and not in synchronization so that one could not get more than 90 gallons per minute even though there were two pumps, *Ibid.*, pp. 161-162, and that both have to pump into the same small pressure tank, *Ibid.*, p. 163. He testified that the City of Heath had a 50,000 gallon tank on Blue Jay Road (one of several tanks of the city) which supplied only four homes and which would be suitable for safely supplying water to the subdivision served by the Appellant, *Ibid.*, pp. 165-166. He also testified that "the general history of maintenance is reported to be very poor now" concerning the Appellant, though he attributed this to "hearsay," although he had just given an example of what he regarded as an unaggressive response by the water purveyor, *Ibid.*, p. 168.

This testimony is not contradicted by the president of the Appellant in his testimony but rather reasons are given by him as to why the Appellant has not provided the needed storage facilities, *Ibid.*, testimony of Mr. David Pheils, pp. 188-189. Such improvements had been needed since at least early 1970, *Ibid.*, p. 188; and "there

is no dispute that the improvements are necessary." remarks of Mr. Gibson, *Ibid.*, p. 190. In response to a question from the Hearing Examiner: "Is it your client's contention that it is not possible for it to provide this kind of service to the community involved because the community inhabitants won't pay sufficient amount of money in order to enable it to make the necessary improvements? Is that what you are driving at?", counsel for the Appellant responded: "No, no. The testimony will show that the reason there was an outage on that day is because of the dispute over the charges being made by the utility company for sewer and water service, and testimony has already been in that valves and faucets were left open, * * *," *Ibid.*, pp. 194-195.

The Appellant has confined its argument concerning the bases for the order of October 10, 1973 to the episode leading up to the Director's order of July 9, 1973 and has insisted that this occurred because of an agreement on the part of the residents in the subdivision to leave their faucets open, *Ibid.*, p. 195. This was denied by the testimony of residents of the subdivision and the Hearing Examiner found no support for the charge of any such agreed activity by the residents, *Hearing Examiner's Report of September 14, 1973*, p. 9. We also find no evidence in the record indicating any such agreed activity to break down, or to prevent the recovery of the water system of the Appellant once it had broken down. by the residents of the subdivision to whom the Appellant was supplying water.

There is in the record from the transcript of the hearing of August 16, 1973 before the Hearing Examiner extensive, unrebutted evidence by an official of the Ohio EPA that the system of the Appellant is inadequate by

a wide margin for peak periods. Indeed, if Mr. Ridenour is correct about pumps "commonly" pumping at half their capacity, the system is not adequate for normal demand period. This, however, is not a testimony as to fact and we have ignored it.

What we cannot ignore is the testimony of an expert as to the system's inadequacy during peak periods, the danger that this poses for water contamination, and his conclusion that the situation cannot improve since "the Forest Hills area has added approximately 500 population" and "is in such a state of flux," *Ibid.*, testimony Mr. Ridenour, p. 175. The testimony of the Appellant's president supports this and shows that for at least the past three and one half years the system has been inadequate, *Ibid.*, testimony of Mr. David Pheils, p. 188. Whatever the reasons of the Appellant for not correcting the situation within that period of time, the undisputed fact remains that this is a public water supply system inadequate to its requirements, that its inadequacy has been protracted for over three years, that there is no indication of any likely correction of that inadequacy in the foreseeable future (as a review of the testimony of of Mr. Pheils, *Ibid.*, pp. 182 ff. indicates), and that this inadequacy exposes a substantial population to the danger of a contaminated water supply.

On this basis, the majority of the Board finds ample evidence in the record, in the findings of the Hearing Examiner, and in Finding No. 5 of the Director in his order of October 10, 1973 to support his Order No. 4 in that said order to require the Appellant to receive water from the City of Heath until the Appellant's own system is adequate. When an admittedly inadequate system is not corrected for over three years, whatever the reasons

for the delay, the public health requirements compel the Director to resort to his statutory powers and to order the Appellant to "provide a water supply not subject to the danger of contamination," sec. 6111.17, and "to change the source of supply," sec. 6111.19.

For the Director not to do this, in the hope that sometime over the next several years the Appellant will find itself by its view able to remove the inadequacies of an admittedly inadequate system, is to risk exposure of a substantial population directly to water-borne disease and, indirectly, to risk the health of still larger numbers to the likelihood of infection from this directly endangered population. In the view of the majority of this Board, it would be conduct such as this by the Director that would be unlawful and unreasonable. In these circumstances and under the evidence adduced at the hearing of August 16, 1973, the action of the Director in issuing his order of October 10, 1973 was both lawful and reasonable.

VII

The majority of the Board, therefore, finds:

1. That the order of October 2, 1973 contained a clerical error in that the transcriber telescoped or elided language in the original form so that only three orders were contained in the Order section rather than four;
2. That this error was called to the attention of the Director by the Motion of the Attorney General of October 3, 1973 and that the Director acted promptly to correct this clerical error by issuing his order of October 10, 1973 which contained the four orders in the Order section which ought

to have been included if the transcriber of the October 2, 1973 order had performed his work accurately;

3. That because of the prompt action by the Attorney General and by the Director no positions were changed as the result of the error and the order of October 10, 1973 contained the language in the precise form which the language of the order of October 2, 1973 ought to have contained but had not as the result of clerical error;

4. That the Director's order of October 10, 1973 is the order which is the subject of the appeal in that it rendered the order of October 2, 1973 a nullity and the time for the appeal began to run from the order of October 10, 1973 in accordance with sec. 3745.04 of the Revised Code;

5. That under general Ohio law, in the absence of a requirement to personally hear an adjudication, the Director may delegate the hearing to a hearing officer so long as the Director retains powers of final decision;

6. That the Director in this case did delegate the hearing of the facts to a hearing officer in such a way as to retain in the Director the full power of final decision, which said power of final decision the Director alone exercised;

7. That the Director is subject to the definition of "agency" as used in sec. 119.01(A) of the Revised Code in its second criteria for application relating to being "specifically made subject to," insofar as the Director's adjudication functions are concerned in this case because of the pro-

visions of sec. 3745.05 subjecting him to sec. 119.09 (which expressly includes sec. 119.07) and sec. 119.10 in adjudications and because of sec. 3745.01 and sec. 6111.13 assigning him general supervision over public water supply;

8. That the notice, hearing, and judgment of the Director conform with the requirements of sec. 6111.12 through sec. 6111.20 of the Revised Code, particularly secs. 6111.16 through 6111.19;

9. That the order of October 10, 1973 is lawfully and reasonably issued under the authority of secs. 6111.12 through 6111.20 of the Revised Code and that it would have been unlawful and unreasonable for the Director to have issued the said order under sec. 6111.06(C), since his order of July 9, 1973 had lapsed on September 10, 1973;

10. That the Director under sec. 119.09 of the Revised Code could appoint a Hearing Examiner to hear the facts of the case and the Director did not personally have to hear the case;

11. That neither the decision of the Franklin County Court of Appeals in *Forest Hills Utility Co. v. Whitman*, 73AP-277, decision rendered August 7, 1973, nor the terms of secs. 6111.16 through 6111.19 required the Director to personally hear the facts of this case, and there is nothing in the language of that decision or in the aforementioned statutes to require the Director personally to hear any case decided within the ambit of secs. 6111.12 through 6111.20 of the Revised Code;

12. That the Director, having allowed his order of July 9, 1973 to lapse as of September 10, 1973,

was without power to continue or modify it or to issue an independent order to the same purport under sec. 6111.06(C) of the Revised Code and that the Director correctly applied secs. 6111.12 through 6111.20, more particularly 6111.16 through 6111.19, of the Revised Code to his order of October 10, 1973 in the manner mentioned in the subsequent opinion of the Franklin County Court of Appeals in *Forest Hills Utility Co. v. Whitman*, 73AP-306, decision rendered October 16, 1973;

13. That the Director extended to the Appellant in this appeal fair notice, hearing, right to counsel, and judgment in accordance with Chapter 119 and secs. 6111.12 through 6111.20 of the Revised Code and the common law and permitted the Appellant rights of cross-examination as well as direct introduction of evidence and that the Director fully discharged his obligation of fairness in this cause;

14. That the order of October 10, 1973, most particularly Order No. 4 therein, met the standards of what such an order must contain in accordance with secs. 6111.17 and 6111.19 of the Revised Code, and the Director did not have a duty to be more specific as to what the Appellant must do to correct the inadequacies of its system;

15. That the said Order No. 4 in the order of October 10, 1973 was in full accordance with said secs. 6111.17 and 6111.19 of the Revised Code in ordering the Appellant to receive water into its lines from the City of Heath and to cease the risk of contamination by the use of water from

its own source, since the Director has the power to order the Appellant to "change the source of supply," sec. 6111.19, and to "provide a water supply not subject to the danger of contamination," sec. 6111.17, which the Director has done in Order No. 4 in the order of October 10, 1973;

16. That Finding No. 5 in the order of October 10, 1973 that concludes the water supply system of the Appellant is inadequate and a danger to the public health is amply supported by the transcript of testimony taken at the hearing of August 16, 1973;

17. That the inadequacy to meet peak demand of the Appellant's water supply system since at least the early part of the year 1970 was admitted by the Appellant;

18. That evidence was offered at the hearing of August 16, 1973 amply supporting the conclusion that the inadequacy of the Appellant's water supply system to meet such peak demand is a danger to public health;

19. That the episode leading to the issuance of the Director's order of July 9, 1973 constituted evidence of the inadequacy of the Appellant's water supply system to meet peak demand, and that its inadequacy to meet peak demand is a danger to the public health;

20. That the episode leading to the order of July 9, 1973 is not the sole or even moving cause of the order of October 10, 1973 but is evidence for the Finding No. 5 by the Director in his order of October 10, 1973 that the Appellant's water sup-

ply system is inadequate and a danger to public health;

21. That the hearing Examiner in his report of September 14, 1973 was correct in concluding that the Appellant had failed to establish an agreed course of action among the residents of the subdivision served by the Appellant's water supply system to open their taps so as to overload the Appellant's system or to prevent its recovery;

22. That the failure or inability of the Appellant to make its admittedly inadequate water supply system adequate posed a danger to public health both to the persons directly served by Appellant's water supply system and indirectly to other persons potentially subject to risk of infection from the health hazard to which the population served by Appellant has been, and is, exposed;

23. That the long-protracted inadequacy of the Appellant's water supply system justified the Director in the issuance of Order No. 4 in the order of October 10, 1973 in ordering the Appellant to receive water from the City of Heath and to not allow contamination of that water and to receive said water until its own system was adequate; and

24. That the action of the Director in issuing his order of October 10, 1973 was lawful and reasonable and in accordance with the statutory requirements of sec. 119.09, sec. 6111.17, sec. 6111.19, sec. 3745.05 as well as with statutes relating to his general supervision over public water supply

such as sec. 3745.01, sec. 6111.13, and sec. 6111.44 of the Revised Code.

Therefore, based upon the findings as above stated, the majority of the Board orders that:

1. The order of the Director of October 10, 1973, including the Findings and Orders therein, is affirmed as a lawful and reasonable order of the Director; and
2. Because the order of October 10, 1973 is in accord with sec. 3745.04 as well as the statutes enumerated in the Board's Finding No. 24, and is a lawful and reasonable order, the Board orders compliance by the Appellant with the Director's order of October 10, 1973 and of this order of this Board affirming the same as lawful and reasonable.

The Board, in accordance with sec. 3745.06 of the Revised Code and EBR-87-01(A), informs the parties that:

> "Any party adversely affected by an order of the Environmental Board of Review may appeal to the Court of Appeals of Franklin County, or, if the appeal arises from an alleged violation of a law or regulation, to the court of appeals of the district in which the violation was alleged to have occurred. Any party desiring to so appeal shall file with the Board a Notice of Appeal designating the order appealed from. A copy of such notice shall also be filed by the Appellant with the court, and a copy shall be sent by certified mail to the Director of Environmental Protection. Such notices shall be filed and mailed within thirty days after the date upon which Appellant received notice from the Board by certified mail of the making of the order

appealed from. No appeal bond shall be required to make an appeal effective.

THE ENVIRONMENTAL BOARD OF REVIEW

EARL FINBAR MURPHY, *Chairman*

STANLEY WEISSMAN, *Vice-Chairman*

Mr. McCutcheon dissents, and his opinion is attached hereto.

Entered in the Journal of
the Board this 13th day of
December, 1973.

BEFORE THE ENVIRONMENTAL BOARD OF REVIEW STATE OF OHIO

Case No. EBR 73-28

FOREST HILLS UTILITY COMPANY,
Appellant,

v.

IRA L. WHITMAN,
Director of Environmental Protection,
Appellee,

CONCUR IN PART DISSENT IN MAIN

I agree with those of my colleagues' findings which find that the Director can correct and thus did lawfully correct the order of October 2, 1973 with the order of October 10, 1973. This is not to raise the issue of the lawfulness or reasonableness of that correcting order. Further, I agree with their finding that the Director may delegate the authority to hear an adjudication under any statute not specifically forbidding such delegation so long as he retains and exercises the ultimate power of decision over the adjudication.

In this dissent, I return to my earlier dissent from the Findings and Final Orders of the majority in *Forest Hills Utility Company, v. Ira L. Whitman,* EBR 73-20, reasserting my resolution, of the majority's error with this additional finding.

The Director, in Finding 6 of his Findings and Orders of October 10, 1973 cities as his authority for holding the hearing and issuing the orders section 6111.06(A)

of the Revised Code. Section 6111.06(A) excludes sections 6111.12 through 6111.20 as well as sections 6111.23, 6111.28 through 6111.30 from its authority. Therefore the hearing of August 16, 1973 and the orders of the Director issued as a result of it were unlawful.

THE ENVIRONMENTAL BOARD
OF REVIEW
RICHARD S. MCCUTCHEN, *Member*

Entered in the Journal of
the Board, this 13th day of
December, 1973.

APPENDIX "C"

TO ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:
The Forest Hills Utility Company
Case No. 73-W-177

Director's Final Findings and Orders

Pursuant to Sections 119.06 et seq. of the Ohio Revised Code and the Regulations of the Ohio Environmental Protection Agency, the Director of The Ohio Environmental Protection Agency makes the following final findings and orders:

FINDINGS

1. Forest Hills Utility Company operates a public water supply located in Forest Hills Subdivision, Heath, Ohio, and serving approximately 215 families.

2. Said public water supply is inadequate, and the residents of said subdivision were without water from July 8, 1973 until midnight July 9, 1973.

3. In order to supply water to the subdivision, on July 9, 1973, the Director of the Ohio Environmental Protection Agency issued proposed findings and orders to the company pursuant to the emergency provisions of Ohio Revised Code Section 6111.06(C).

4. A hearing was held on this matter on August 16, 1973. Testimony was taken and a record was produced, and the hearing examiner subsequently issued his report and recommendations.

5. The hearing examiner in his report cited numerous instances of hardship to individual residents of the sub-

division and of danger to public health arising from inadequacy of the water supply, and concluded that "as a result of the inadequacy of said water supply, the public health of the area and the health of individuals in the area is endangered in such a manner as to constitute a health emergency."

6. In adopting the initial emergency order in this case, the Director acted under the provisions of Section 6111.06(C) of the Ohio Revised Code. Both the Franklin County Court of Appeals and the Environmental Board of Review subsequently ruled that Section 6111.06 sets forth a procedural mechanism for the issuance of emergency orders by the Director in carrying out his substantive powers under O.R.C. Sections 6111.12 through 6111.30. Section 6111.06(C) provides that such orders shall be issued in accordance with the provisions of the Ohio Administrative Procedure Act (Chapter 119 of the Ohio Revised Code), except that such orders shall be effective immediately. After an adjudication hearing is held in accordance with the provisions of Chapter 119, the Director is authorized under Section 6111.06(A) to adopt, issue, modify, rescind, or revoke orders, including orders carrying out the substantive powers granted Section 6111.12 through 6111.30. The applicability of Section 6111.06(A) to these proceedings was recognized by the Hearing Examiner on page 2 of his report.

Accordingly, the Director is authorized under Section 6111.06(A) to issue Final Findings and Orders that are not of an emergency character after the adjudication hearing provided for in Section 6111.06(C) has been held and a Hearing Examiner's Report and Recommendations submitted to the Director for his review,

all in accordance with Chapter 119. Such Final Findings and Orders are therefore issued under the substantive powers of the Director specified in Sections 6111.12 through 6111.30 and in accordance with the procedures specified in Section 6111.06(A), and they remain in effect until fully complied with.

ORDERS

Therefore, based upon the evidence cited by the hearing examiner and upon his conclusions and recommendations, the Director makes the following orders:

1. Continue to authorize, permit and allow the entrance of water from the City of Heath public water works into the public water pipelines serving the residents of the Forest Hills Subdivision.

2. Prohibit any employee, agent, officer or any other person under your control or authority from tampering with, damaging or in any way hindering the passage of water from the City of Heath water works into your system and into the dwellings of the residents of the subdivision.

3. Continue to take action to assure that the incoming water from the City of Heath water works does not become contaminated in any manner by the water pipelines or system of the Forest Hills Utility Company.

4. Continue to authorize, permit and allow the flow of water from the City of Heath water works into the Forest Hill Utility Company pipelines and into the dwellings in said subdivision until the Director determines (1) that the Forest Hill Utility Company has instituted a public water supply with adequate pressure and sufficient quality and quantity to protect the public health;

and (2) that there is no threat of contamination and/or inadequacy of the public water supply.

October 10, 1973
Date

IRA L. WHITMAN, *Director*

I hereby certify that this is a true and accurate copy of the findings and orders to the Forest Hills Utility Company as entered onto the Ohio EPA NPDES Permit Section's Journal, October 10, 1973.

RALPH W. EVERETT, *Chief*
NPDES Permit Record Section

APPENDIX "D"

THE SUPREME COURT OF THE STATE OF OHIO

No. 74-659

1974 TERM
To wit: October 4, 1974

THE STATE OF OHIO,
City of Columbus.

FOREST HILLS UTILITY CO.,
Appellant,

vs.

IRA L. WHITMAN,
Director, Environmental Protection,
Appellee.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR FRANKLIN COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.
COSTS:

Motion Fee, $20.00, paid by Rankin M. Gibson.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this ..... day of ..... 19....
.....Clerk
.....Deputy

APPENDIX "E"

THE SUPREME COURT OF OHIO

No. 74-659

1974 TERM

To wit: October 4, 1974

THE STATE OF OHIO,
City of Columbus.

FOREST HILLS UTILITY CO.,
Appellant,

vs.

IRA L. WHITMAN,
Director, Environmental Protection,
Appellee.

APPEAL FROM THE COURT OF APPEALS FOR FRANKLIN COUNTY

This cause, here on appeal as of right from the Court of Appeals for FRANKLIN County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for FRANKLIN County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ____ day of _____ 19 ___

_____ Clerk

_____ Deputy

APPENDIX "F"

THE SUPREME COURT OF THE STATE OF OHIO

No. 74-659

1974 TERM
To wit: November 1, 1974
THE STATE OF OHIO,
City of Columbus.

FOREST HILLS UTILITY CO.,
Appellant,

vs.

IRA L. WHITMAN,
Director, of Environmental Protection,
Appellee.

REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ____ Page ____

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 1st day of November, 1974.

THOMAS L. STARTZMAN, *Clerk.*
By _____ Deputy.

APPENDIX "G"

Fourteenth Amendment, United States Constitution:

§ 1 All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

REVISED CODE OF OHIO

§ 4905.32 Schedule rate collected. (GC § 614-18)

No public utility shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time.

No public utility shall refund or remit directly or indirectly, any rate, rental, toll, or charge so specified, or any part thereof, or extend to any person, firm, or corporation, any rule, regulation, privilege, or facility except such as are specified in such schedule and regularly and uniformly extended to all persons, firms, and corporations under like circumstances for like, or substantially similar, service.

HISTORY: GC § 614-18; 102 v 549(555), § 20. Eff 10-1-53.

§ 6111.03 Powers of director of environmental protection.

The director of environmental protection shall have power:

(A) To develop plans and programs for the prevention, control, and abatement of new or existing pollution of the waters of the state, including, but

not limited to, adopting, amending, and repealing standards of quality for the waters of the state;

(B) To advise, consult, and co-operate with other agencies of the state, the federal government, other states, and interstate agencies, and with affected groups, political subdivisions, and industries in furtherance of the purposes of sections 6111.01 to 6111.08 ♦ and sections 6111.31 to 6111.38 ♦ of the Revised Code;

(C) To administer grants from the federal government and from other sources, public or private, for carrying out any of its functions, all such moneys to be deposited in the state treasury, and kept by the treasurer of state in a separate fund subject to the lawful orders of the director;

(D) To administer state grants for the construction of sewage and waste collection and treatment works;

(E) To encourage, participate in, or conduct studies, investigations, research, and demonstrations relating to water pollution, and the causes, prevention, control, and abatement thereof, as is advisable and necessary for the discharge of its duties under sections 6111.01 to 6111.08 ♦ of the Revised Code;

(F) To collect and disseminate information relating to water pollution and the prevention, control, and abatement thereof;

(G) To adopt, modify, and repeal ♦ regulations governing the procedure ♦ for hearings, filing of reports, the issuance of permits, the issuance of industrial water pollution control certificates and all other matters relating to procedure;

(H) To issue, modify, or revoke orders to prevent, control, or abate water pollution, subject to section 6111.04 of the Revised Code, (1) prohibiting or abating discharges of sewage, industrial waste, or other wastes into the waters of the state; (2) requiring the construction of new disposal systems or any

parts thereof, or the modification, extension, or alteration of existing disposal systems or any parts thereof♦; (3) prohibiting additional connections to or extensions of a sewerage system when such connections or extensions would result in an increase in the polluting properties of the effluent from such system when discharged into any waters of the state. In the making of such orders the director shall give consideration to, and base his determination on, evidence relating to the technical feasibility and economic reasonableness of complying with such orders and to evidence relating to conditions calculated to result from compliance with such orders, and their relation to benefits to the people of the state to be derived from such compliance in accomplishing the purposes of sections 6111.01 to 6111.08♦ and sections 6111.31 to 6111.38♦ of the Revised Code;

(I) To review plans, specifications, or other data relative to disposal systems or any part thereof in connection with the issuance of orders, permits, and industrial water pollution control certificates under sections 6111.01 to 6111.08♦ and sections 6111.31 to 6111.38♦ of the Revised Code;

(J) To issue, revoke, modify, or deny permits for the discharge of sewage, industrial waste, or other wastes into the waters of the state, and for the installation, modification, or operation of disposal systems or any parts thereof and set terms and conditions of permits, in order to prevent, control, or abate water pollution. In issuing, revoking, modifying, or denying permits the director shall give consideration to, and base his determination on, evidence relating to the technical feasibility and economic reasonableness of removing the polluting properties from such wastes and to evidence relating to conditions calculated to result from such action, and their relation to benefits to the people of the

state and to accomplishment of the purposes of sections 6111.01 to 6111.08◆ of the Revised Code.

The director shall specify in permits for the discharge of sewage, industrial waste, and other waste, the volume, duration, frequency, and strength of such sewage, industrial waste, and other wastes which may be discharged. The director shall specify in such permits that the permit is conditioned upon the right of his authorized representatives to enter upon the premises of the person to whom the permit has been issued for the purpose of determining compliance with sections 6111.01 to 6111.08◆ of the Revised Code, rules and regulations adopted thereunder, or the terms of a permit, order, or other determination◆. The director shall issue or deny an application for a permit for a new discharge, or for the installation or modification of a disposal system, within one hundred twenty days of the date on which he receives a complete application will all plans, specifications, construction schedules, and other pertinent information required by the director. Applications for renewals of permits shall be acted upon by the director within sixty days. The director may condition such permits upon the installation of discharge or water quality monitoring equipment or devices and the filing of such periodic reports on the amounts and contents of discharges and the quality of receiving waters as the director prescribes. In requiring monitoring devices and reports the director shall give consideration to technical feasibility and economic reasonableness, and allow reasonable time for compliance. A permit may be issued for a period not to exceed three years, and may be renewed upon application for renewal, and upon a finding by the director that the permit holder is

making satisfactory progress toward the achievement of applicable discharge and water quality standards. No application shall be denied or permit revoked or modified without a written order stating the findings upon which denial, revocation, or modification is based. A copy of the order shall be sent to the applicant or permit holder by certified mail.

(K) Adopt, modify, and repeal regulations, in accordance with Chapter 119. of the Revised Code, prescribing a schedule of application and renewal fees to be paid by applicants for and holders of permits under division (J) of this section. Such schedule of fees shall be designed solely to defray the costs of processing, issuing, revoking, modifying, and denying permits.

(L) To institute or cause to be instituted in any court of competent jurisdiction, proceedings to compel compliance with sections 6111.01 to 6111.08◆ of the Revised Code, or with the orders of the director issued under such sections;

(M) To issue, deny, revoke, or modify industrial water pollution control certificates;

(N) To certify to the government of the United States or any agency thereof that an industrial water pollution facility is in conformity with the state program or requirements for control of water pollution whenever such certification may be required for a taxpayer under the Internal Revenue Code of the United States, as amended;

(O) To exercise all incidental powers necessary to carry out the purposes of sections 6111.01 to 6111.08◆ and sections 6111.31 to 6111.38◆ of the Revised Code.

*HISTORY: 131 v 1419 (Eff 11-9-65); 132 v S 20 (Eff 11-21-67); 132 v H 314 (Eff 12-14-67); 134 v S 397. Eff 10-23-72.

§ 6111.06 Opportunity for hearing; emergency procedures.

(A) All proceedings of the director of environmental protection, or his officers or agents, under sections 6111.01 to 6111.08◆ and sections 6111.31 to 6111.38◆ of the Revised Code, including the adoption, issuance, modification, rescission, or revocation of rules and regulations, permits, orders, and notices, and the conduct of hearings, except standards of water quality adopted pursuant to section 6111.041 [6111.04.1] of the Revised Code, shall be subject to and governed by sections 119.01 to 119.13,◆ and Chapter 3745. of the Revised Code.

(B) The director shall not refuse to issue a permit, nor modify or revoke a permit already issued, unless the applicant or permit holder has been afforded an opportunity for a hearing prior to the refusal to issue the permit or prior to the modification or revocation of the permit.

(C) Whenever the director officially determines that an emergency exists requiring immediate action to protect the public health or welfare, he may, without notice or hearing, issue an order reciting the existence of the emergency and requiring that such action be taken as is necessary to meet the emergency. Notwithstanding division (A) of this section, such order shall be effective immediately. Any person to whom such order is directed shall comply therewith immediately, but on application to the director shall be afforded a hearing as soon as possible, and not later than twenty days after such application. On the basis of such hearing, the director shall continue such order in effect, revoke it, or modify it. No such emergency order shall remain in effect for more than sixty days after its issuance.

*HISTORY: 131 v 1420 (Eff 11-9-65); 132 v H 314 (Eff 12-14-67); 134 v S 397. Eff 10-23-72.

§ 6111.16 Notice of danger of contamination or inadequate supply.

When the director of environmental protection finds, upon investigation, that a public water supply is subject to the danger of contamination by reason of unsatisfactory location, protection, construction, operation, or maintenance of the system, or by reason of the existence of an unsafe emergency supply or connection to an unsafe private or auxiliary supply, or if the director finds upon investigation that the public health is endangered by reason of the existence of an inadequate public water supply or water-works system, he shall notify the municipal corporation, county, public institution, ◆ or person owning or operating such public water supply or water-works system of his findings and of the time and place, when and where a hearing may be had ◆. Such notice shall be by personal service, or shall be sent by certified mail to the mayor or managing officer or officers of the municipal corporation, county, or public institution or to the ◆person owning or operating such supply. Investigations made in accordance with this section may be at the initiative of the director.

*HISTORY: 134 v S 397. Eff 10-23-72.

§ 6111.17 Corrections and changes; notice.

After the hearing provided for in section 6111.16 of the Revised Code, if the director of environmental protection determines that improvements or changes are necessary and should be made, the director◆ shall notify the mayor or managing officer or officers of the municipal corporation, county, or public institution or the◆person owning or operating such water supply or water-works system to make improvements, corrections, and changes in the location, protection, construction, operation, or maintenance of the water supply or water-works system satisfactory to the director, so as to prevent the con-

tamination of the water supply or to provide a water supply not subject to the danger of contamination, or to provide a water supply and water-works system adequate to avoid endangering the public health. The ♦notification shall be made by personal service upon or by certified mail to the mayor or managing officer or officers of the municipal corporation, county, or public institution or to the officials, corporation, partnership, or person to whom the order applies.♦

*HISTORY: 134 v S 397. Eff 10-23-72.

§ 6111.23 Application for additional charges for water supply.

Where an order of the director of environmental protection to a♦person owning and operating a water works is♦final and it is claimed by such♦ person that the revenues derived from the operation of such water works are not sufficient to warrant the expense of making the improvements or changes so ordered, an application may be made to the public utilities commission for authority to make and collect additional charges from the water consumers and users of the utility's service. Upon the filing of such application the commission shall fix a time for the hearing thereof and give notice thereof to the mayor of the municipal corporation and the director. If upon hearing the commission finds that the rates theretofore authorized to be charged will not provide revenue sufficient to operate said water works and make a reasonable return upon the investment after such improvements and changes are made, it shall by order authorize the collection of such additional charges and compensation as may be just and reasonable.

*HISTORY: 134 v S 397. Eff 10-23-72.

APPENDIX "H"

BEFORE THE OHIO ENVIRONMENTAL PROTECTION AGENCY

Forest Hills Utility Company
c/o David R. Pheils, President
Route 4
Newark, Ohio 43055

Davis R. Pheils, President of
Forest Hills Utility Company
6012 Susann Drive
Toledo, Ohio 43612

Pursuant to the authority invested in me as Director of Environmental Protection, with the duty to supervise the operation and maintenance of public water supplies under sections 6111.12 to 6111.20, inclusive, of the Revised Code, and upon investigation of your water works and public water supply in Heath, Ohio, I hereby issue the following findings and order:

FINDINGS

1. Forest Hills Utility Company operates a public water supply located in Forest Hills Subdivision, Heath, Ohio, and serving approximately 215 families.

2. Said public water supply is inadequate, and the residents of said Subdivision have been without water from the evening of July 7, 1973, to the present.

3. As a result of the inadequacy of said public water supply, the public health of the area and the health of individuals in the area is endangered in such a manner as to constitute a health emergency.

ORDER

1. Immediately authorize, permit and allow the entrance of water from the City of Heath public water works into the public water pipe lines serving the residents of the Forest Hills Subdivision.

2. Prohibit any employee, agent, officer or any other person under your control or authority from tampering with, damaging or in any way hindering the passage of water from the City of Heath water works into your system and into the dwellings of the residents of the Subdivision.

3. Take immediate actions to assure that the incoming water from the City of Heath water works does not become contaminated in any manner by the water pipe lines or system of the Forest Hills Utility Company.

4. Continue to authorize, permit and allow the flow of water from the City of Heath water works into the Forest Hills Utility Company pipe lines and into the dwellings in said Subdivision until the Director determines (1) that the Forest Hill Utility Company has instituted a public water supply with adequate pressure and sufficient quality and quantity to protect the public health; and (2) that there is no threat of contamination and/or inadequacy of the public water supply.

Dated: July 9, 1973

IRA L. WHITMAN
Director of Environmental Protection

You are further notified that, pursuant to Sections 119.03 (C) and 3745.05 of the Revised Code, the foregoing findings and order are final and are effective im-

mediately. You are entitled to a hearing upon appeal of this order before the Environmental Board of Review. Your notice of appeal must be filed with the Environmental Board of Review within thirty days of notice of these orders and with the Director of Environmental Protection within three days of filing with the Environmental Board of Review.

Certified Mail

cc: Rankin M. Gibson, Esq.
James H. Ledman, Esq.
Mayor, City of Heath, Ohio
A. M. Greenlee, D.V.M.
Dept. of Health

I hereby certify that this is a true and accurate copy of the findings and orders to the Forest Hills Utility Company, Heath, Ohio, as entered onto the Ohio EPA Water Permit Section's Journal July 10, 1973.

RALPH W. EVERETT, *Assistant Chief*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-927

FOREST HILLS UTILITY COMPANY,
Petitioner,

v.

IRA L. WHITMAN,
DIRECTOR OF ENVIRONMENTAL PROTECTION,
Respondent.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

LUCAS, PRENDERGAST, ALBRIGHT,
GIBSON, BROWN & NEWMAN
RANKIN M. GIBSON, ESQ.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-927

FOREST HILLS UTILITY COMPANY,
Petitioner,

v.

IRA L. WHITMAN,
DIRECTOR OF ENVIRONMENTAL PROTECTION,
Respondent.

STATEMENT OF THE CASE

Subsequent to the filing of the petition in the case at bar, the Supreme Court of Ohio, on January 29, 1975, rendered an opinion, 41 Ohio St. (2d) 25, in Cases Nos. 73-874, 73-915, and 74-8, referred to in the petition. The opinion and the orders of the Supreme Court of Ohio form the appendix of this supplement.

The requirements of due process of law extend to every case of the exercise of governmental power. *Union Bridge Co. v. United States,* 204 U.S. 364, 27 S. Ct. 367 (1907); *Chicago, Burlington & Quincy R. Co. v. Illinois,* 200 U.S. 561, 26 S. Ct. 341 (1906). The object of the constitutional guarantee of due process of law is to preserve personal and property rights against the arbitrary action of public officials. 16 Am. Jur. (2d), Constitutional Law, § 550.

Due process of law requires that orders of an executive officer, board or commission be within the authority of the officer, board or commission. *Panama Refining Company v. Ryan,* 293 U.S. 388, 55 S. Ct. 241 (1935); *Roach v. Johnson,* 48 F. Supp. 833 (D.C., Ind., 1943). If an administrative agency, in its proceedings, violates its rules and prejudice results, any action taken as a result of the proceedings cannot stand. *United States ex rel. Accardi v. Shaughnessy,* 347 U.S. 260, 74 S. Ct. 499 (1954); *Service v. Dulles,* 354 U.S. 363, 77 S. Ct. 1152 (1957); *Sangamon Valley Television Corporation v. United States,* 269 F. (2d) 221 (C.A., D.C., 1959); *Pacific Molasses Company v. Federal Trade Commission,* 356 F. (2d) 386 (C.A. 5, 1966); *United States v. Leahey,* 434 F. (2d) 7 (C.A. 1, 1970); *United States v. Heffner,* 420 F. (2d) 809 (C.A. 4, 1970); *Behagen v. Intercollegiate Conference of Faculty Representatives,* 346 F. Supp. 602 (D.C., Minn., 1972); *United States v. Capra,* 372 F. Supp. 609 (D.C., N.Y., 1974). Administrative determinations must have a basis in law and must be within the granted authority. *Social Security Board v. Nierotko,* 327 U.S. 358, 66 S. Ct. 637 (1946); *Jeffries v. Olesen,* 121 F. Supp. 463 (D.C., Calif., 1954).

The guarantee of due process of law is a restraint upon legislative bodies. *Yellin v. United States,* 374 U.S. 109, 83 S. Ct. 1828 (1963). Due process of law also restricts a judicial department. *National Association for the Advancement of Colored People v. Alabama,* 377 U.S. 288, 84 S. Ct. 1302 (1964).

As of January 29, 1975, the Supreme Court of Ohio has determined that the respondent in a case involving an inadequate public water supply must proceed under the provisions of §§ 6111.16 and 6111.17, Revised Code

of Ohio. § 6111.16, as amended October 23, 1972, expressly provided that —

> "*** if the director [of environmental protection] finds upon investigation that the public health is endangered by reason of the existence of an inadequate public water supply or water-works system, he shall notify the *** person owning or operating such public water supply or water-works system of his findings and of the time and place, when and where a hearing may be had ***."

To date, the respondent has not made the necessary findings, nor given the necessary notice to petitioner.

By the express provisions of § 6111.17, Revised Code of Ohio, after the hearing provided for by § 6111.16, the respondent must first determine "that improvements or changes are necessary and should be made". The Supreme Court of Ohio, in construing § 6111.17, held, in *Forest Hills Utility Company v. Gardner*, 31 Ohio St. (2d) 78, 285 N.E. (2d) 379 (1972) that the absence of such a determination is a fatal deficiency in any order directed to a person owning or operating a public water supply or water-works system. Plainly, the respondent, in his orders of October 10, 1973, did not determine "that improvements or changes are necessary and should be made".

By the express provisions of § 6111.17, Revised Code of Ohio, where the necessary hearing and determinations are made, the respondent is authorized and empowered only —

> "*** to notify *** the person owning or operating such water supply or water-works system to make improvements, corrections, and changes in the location, protection, construction, operation, or maintenance of the water supply or water-works system

> *** so as to *** provide a water supply and waterworks system adequate to avoid endangering the public health ***."

The respondent was, and is, without jurisdiction under § 6111.17, Revised Code of Ohio, to order petitioner to take any of the actions commanded by respondent in his orders of October 10, 1973.

Clearly, if due process requires an agency, in its proceedings, to comply with its rules, then the failure of the state officer, such as the respondent, to comply with the statutory provisions under which he derives his authority and must exercise his authority, deprives the petitioner of his property without due process. The respondent has complied with neither the authority nor the procedure established by §§ 6111.06 and 6111.07, Revised Code of Ohio, which the Supreme Court of Ohio, on January 29, 1975, found to be required.

For this reason, in addition to the reasons stated in the petition for a writ of certiorari to the Supreme Court of Ohio, the petition for writ of certiorari should be granted.

Respectfully submitted,
LUCAS, PRENDERGAST, ALBRIGHT,
GIBSON, BROWN & NEWMAN
By RANKIN M. GIBSON
42 East Gay Street
Columbus, Ohio 43215
Attorneys for Petitioner

Statement of the Case.

FOREST HILLS UTILITY COMPANY, APPELLANT, *v.* WHITMAN, DIR. OF ENVIRONMENTAL PROTECTION, APPELLEE.

(Two cases.)

FOREST HILLS UTILITY COMPANY, APPELLEE, *v.* WHITMAN, DIR. OF ENVIRONMENTAL PROTECTION, APPELLANT.

[Cite as Forest Hills Utility Co. v. Whitman (1975), 41 Ohio St. 2d 25.]

Public Utilities—Public water supply company—Inadequate service—Order of Director of Environmental Protection to improve service—Emergency order, without notice or hearing, not authorized—R. C. 6111.06(C).

1. The emergency-order power set forth in R. C. 6111.06 (C) may be utilized by the Director of Environmental Protection in water-pollution emergencies only.
2. An inadequate public water supply situation is not a water-pollution emergency, and does not justify the invocation of the emergency-order power set forth in R. C. 6111.06(C).
3. The notice, hearing and order provisions of R. C. 6111.16 and 6111.17 establish the procedure to be followed by the Director of Environmental Protection in remedying an inadequate public water supply situation.

(Nos. 73-874, 73-915 and 74-8—Decided January 29, 1975.)

APPEAL from a judgment of the Court of Appeals for Franklin County entered on August 24, 1973 (Case No. 73-874).

APPEALS from a judgment of the Court of Appeals for

Franklin County entered on November 12, 1973 (Case Nos. 73-915 and 74-8).

On July 9, 1973, the Director of Environmental Protection (hereinafter referred to as the Director) sent the following written statement to the Forest Hills Utility Company:

"Pursuant to the authority invested in me as Director of Environmental Protection, with the duty to supervise the operation and maintenance of public water supplies under Sections 6111.12 to 6111.20, inclusive, of the Revised Code, and upon investigation of your water works and public water supply in Heath, Ohio, I hereby issue the following findings and order:

"FINDINGS

"1. Forest Hills Utility Company operates a public water supply located in Forest Hills Subdivision, Heath, Ohio, and serving approximately 215 families.

"2. Said public water supply is inadequate, and the residents of said subdivision have been without water from the evening of July 7, 1973, to the present.

"3. As a result of the inadequacy of said public water supply, the public health of the area and the health of individuals in the area is endangered in such a manner as to constitute a health emergency.

"ORDER

"1. Immediately authorize, permit and allow the entrance of water from the city of Heath public water works into the public water pipe lines serving the residents of the Forest Hills Subdivision.

"2. Prohibit any employee, agent, officer or any other person under your control or authority from tampering with, damaging or in any way hindering the passage of

water from the city of Heath water works into your system and into the dwellings of the residents of the subdivision.

"3. Take immediate actions to assure that the incoming water from the city of Heath water works does not become contaminated in any manner by the water pipe lines or system of the Forest Hills Utility Company.

"4. Continue to authorize, permit and allow the flow of water from the city of Heath water works into the Forest Hills Utility Company pipe lines and into the dwellings in said subdivision until the Director determines (1) that the Forest Hills Utility Company has instituted a public water supply with adequate pressure and sufficient quality and quantity to protect the public health; and (2) that there is no threat of contamination and/or inadequacy of the public water supply."

This order was issued without notice or a hearing, and, according to the final section of the order, was "effective immediately."

Apparently confused about the proper method of securing review of the order, Forest Hills filed two separate notices of appeal—one before the Court of Common Pleas of Franklin County pursuant to R. C. 119.12; the other, before the Environmental Board of Review. To facilitate an understanding of the factual history of these appeals, their treatment will be separately described.

Appeal Initiated in Common Pleas Court.

On the same day that Forest Hills filed its notice of appeal with the Court of Common Pleas, that court granted the utility company's motion for a stay of execution of the July 9, 1973, order. The Director subsequently filed a motion to dissolve the stay order; when this motion was overruled, he appealed to the Court of

Appeals for Franklin County. The Director sought a suspension of the trial court's stay order from the Court of Appeals, and it was upon that motion that the Court of Appeals rendered the August 24, 1973, judgment presently before this court in case No. 73-874. The opinion supporting the judgment was based upon the appellate court's assumption that the July 9, 1973, order was issued under R. C. 6111.06(C)[1], the first sentence of which provides:

"Whenever the Director officially determines that an emergency exists requiring immediate action to protect the public health or welfare, he may, without notice or hearing, issue an order reciting the existence of the emergency and requiring that such action be taken as necessary to meet the emergency."

The court noted that R. C. 6111.06(C) also provided that the recipient of such an order was required to "comply therewith immediately, but on application to the Director shall be afforded a hearing as soon as possible, and not later than twenty days after such application." The court concluded that after the hearing specified by R. C. 6111.06(C), the Environmental Board of Review would have jurisdiction to review the Director's action. There-

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[1] The applicability of R. C. 6111.06(C) to the July 9, 1973, order was apparently raised *sua sponte* by the Court of Appeals. In fact, the Director's memorandum filed with the Court of Appeals in support of the motion to suspend the trial court's stay order argued that R. C. 6111.06(C) pertained to water pollution emergency orders, and hence was inapplicable to an order involving an inadequate public water supply. Nor did the July 9, 1973, order mention R. C. 6111.06(C); instead, it began by stating that it was issued "under Sections 6111.12 to 6111.20, inclusive, of the Revised Code * * *." None of those sections provide for the issuance of an immediately effective order without notice or a hearing. A subsequent section of the order invoked R. C. 119.06, which states, in pertinent part:

"The following adjudication orders shall be effective without a hearing:

fore, the journal entry of judgment stated that "the Common Pleas Court was without jurisdiction in the instant appeal, and its orders, therefore, are a nullity and the appeal therefrom is *sua sponte* dismissed." The case was then remanded to the Director for the hearing specified in R. C. 6111.06(C).

Appeal Initiated before the Environmental Board of Review.

The resolution of the appeal initiated before the Environmental Board of Review was, to a large extent, dictated by the above-described opinion and judgment of the Court of Appeals. Upon receipt of that opinion, the Director filed a motion to dismiss the appeal pending before the board. The motion stated that the reason supporting it was "lack of jurisdiction of the subject matter in accordance with the decision of the Franklin County Court of Appeals * * *." In a split decision, the board granted the motion to dismiss, holding that the July 9, 1973, order was an emergency order properly issued under R. C. 6111.06 (C)[2], and that R. C. 3745.04 pre-

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"* * *

"(C) Orders or decisions of an authority within an agency if the rules of the agency or the statutes pertaining to such agency specifically give a right of appeal to a higher authority within such agency or to another agency and also give the appellant a right to a hearing on such appeal."

However, the applicability of R. C. 119.06(C) to the July 9, 1973, order is highly questionable, and the Director does not rely upon it before this court.

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[2] As in the appeal initiated with the Court of Common Pleas of Franklin County, the Director insisted before the Environmental Board of Review that the July 9, 1973, order was not issued pursuant to R. C. 6111.06(C). Counsel for the Director repeatedly stated during a hearing conducted by the board that the emergency-order power contained in R. C. 6111.06(C) applied only to water-pollution emergencies, and not to inadequate public water supply situations. Nevertheless, the majority of the board applied R. C. 6111.06(C), stating that they were "correcting the legal errors of the Director and yet affirming his action."

vented the board from reviewing initial emergency orders of the Director.

Pursuant to R. C. 3745.06, Forest Hills appealed the board's decision to the Court of Appeals for Franklin County. Shortly after this appeal was perfected, the Director, through a hearing examiner, conducted the R. C. 6111.06 (C) hearing which the Court of Appeals had ordered in its prior opinion. The hearing examiner subsequently submitted a written report to the Director, in which the examiner recommended that the Director utilize R. C. 6111.06 (C) to re-issue the substance of the July 9, 1973, order.

The Court of Appeals relied upon this hearing to state that the Environmental Board of Review now had jurisdiction to review the July 9, 1973, order. On November 12, 1973, the court filed its judgment entry reversing the decision of the board and remanding the case to the board "for hearing and determination on the merits."

The cause is now before this court in case No. 73-874, from the August 24, 1973, judgment of the Court of Appeals pursuant to the allowance of Forest Hills' motion to certify the record. In case No. 73-915 and case No. 74-8, the causes are before this court upon appeals from the November 12, 1973, judgment of the Court of Appeals pursuant to the allowance of motions by both parties to certify the record.

Messrs. Lucas, Prendergast, Albright, Gibson, Brown & Newman and *Mr. Rankin M. Gibson*, for Forest Hills Utility Company.

Opinion, per O'Neill, C. J.

Mr. William J. Brown, attorney general, *Mr. William S. Fein, Mr. A. Mark Segreti, Jr.*, and *Mr. Joel S. Taylor*, for the Director of Environmental Protection.

O'Neill, C. J. The primary issue in these procedurally complex appeals is whether Ohio's 1972 Environmental Protection Act (Amended Substitute Senate Bill No. 397, 134 Ohio Laws 695) authorizes the Director of Environmental Protection to rectify an inadequate public water supply situation by invoking the emergency-order power granted him under R. C. 6111.06 (C).

The statutory history behind the relevant statutes leads this court to conclude he is not so authorized, and hence his July 9, 1973, order was unlawful.

The original predecessors of R. C. 6111.01 through 6111.08, inclusive, as they existed prior to the enactment of the 1972 Environmental Protection Act, were contained in Substitute Senate Bill No. 62 (124 Ohio Laws 855), passed in 1951. That Act established the Water Pollution Control Board, whose main function was to control, prevent and abate pollution of the state's water sources. One power which the Act vested in the Water Pollution Control Board was specified in G. C. 1261-1*g* (d)[3]:

"Whenever the Board officially determines that an emergency exists requiring immediate action to protect the public health or welfare, it may without notice or hearing issue an order reciting the existence of the emergency and requiring that such action be taken as is necessary to meet the emergency. Notwithstanding the provisions of subsections (a) and (b) of this section such order shall be effective immediately. Any person to whom such order is directed shall comply therewith immediately but on application to the Board shall be afforded a hearing as soon as possible, and not later than twenty days after such application. On the basis of such

[3] Prior to the 1972 Environmental Protection Act, former G. C. 1261-1*g*(d) became R. C. 6111.06(C).

hearing the Board shall continue such order in effect, revoke it or modify it; provided that no such emergency order shall remain in effect for more than sixty days after its issuance."

Although former R. C. 6111.06 (C) did not define the type of emergency which would justify the invocation of the summary power found therein, the vesting of that power with the Water Pollution Control Board clearly demonstrated that only water pollution emergencies would provide such justification.

Since an inadequate public water supply situation is not a water-pollution emergency, it is undisputed that prior to the enactment of the 1972 Environmental Protection Act, R. C. 6111.06 (C) could not be utilized to combat an inadequate water supply situation. Such a situation was, however, amenable to R. C. 6111.16 and 6111.17. R. C. 6111.16 provided, in part, that "if the Director [of Health] finds upon investigation that the public health is endangered by reason of the existence of an inadequate public water supply or water-works system, he shall notify the municipal corporation, county, public institution, corporation, partnership, or person, owning or operating such public water supply or water-works system of his findings and of the time and place, when and where a hearing may be had before the Public Health Council."

R. C. 6111.17 stated, in part:

"After the hearing provided for in Section 6111.16 of the Revised Code, if the Public Health Council determines that improvements or changes are necessary and should be made, the Director of Health shall notify the mayor or managing officer or officers of the municipal corporation, county, or public institution or the corpora-

tion, partnership, or person owning or operating such water supply or water-works system to make improvements, corrections, and changes in the location, protection, construction, operation, or maintenance of the water supply or water-works system satisfactory to the Director, so as * * * to provide a water supply and water-works system adequate to avoid endangering the public health. The order of the Director and the time fixed for making the improvements or changes shall be approved by the council and the notification shall be made by personal service upon or by registered letter to the mayor or managing officer or officers of the municipal corporation, county, or public institution or to the officials, corporation, partnership, or person to whom said order applies."

Ohio's 1972 Environmental Protection Act completely restructured this state's programs pertaining to public water supplies. One section of the 1972 legislation established R. C. Ch. 3745. R. C. 3745.01 created the state Environmental Protection Agency, headed by a Director. The purpose of the Agency, according to R. C. 3745.01, is to "administer the laws and regulations pertaining to the prevention, control, and abatement of air and water pollution, public water supply, comprehensive water resource management planning, and the disposal and treatment of solid wastes, sewage, industrial waste, and other wastes."

It is obvious from this language that the Environmental Protection Agency would assume the water quality and quantity responsibilities formerly vested by R. C. Ch. 6111 in the Water Pollution Control Board, the Public Health Council and the Director of Health. Hence, it is not surprising that the 1972 Act abolished the Water Pollution Control Board and transferred its powers to

the Environmental Protection Agency, and substituted references to the Agency or its Director for prior R. C. Ch. 6111 references to the Public Health Council and the Director of Health.

The Director contends that by consolidating in one agency the powers previously exercised by the Water Pollution Control Board, the Public Health Council and the Director of Health, the 1972 legislation also eliminated the inapplicability of R. C. 6111.06 (C) to inadequate water supply situations. This court disagrees. Other than changing the holder of the powers contained in R. C. Ch. 6111, the 1972 Act did not materially alter the procedures previously established by law. In particular, the emergency-order power contained in R. C. 6111.06 (C) was left intact, as were the notice and hearing provisions of R. C. 6111.16 and 6111.17. The failure or refusal of the General Assembly to modify the emergency-order power set forth in R. C. 6111.06 (C) in any way other than changing the holder of the power leads this court to conclude that the power is exercisable by the Director only in those situations in which it was formerly exercisable by the Water Pollution Control Board. Specifically, R. C. 6111.06 (C) can be invoked only in cases involving water-pollution emergencies. An inadequate public water supply situation, which is the factual basis of these appeals, does not justify the issuance of an order pursuant to R. C. 6111.06 (C). Instead, the Director must comply with the notice, hearing and order provisions of present R. C. 6111.16 and 6111.17. Since the July 9, 1973, order was issued without affording Forest Hills either notice or an opportunity for a hearing, it is unlawful.

The appellate procedure to challenge the July 9, 1973, order is found in R. C. Ch. 3745; it is the procedure ini-

tiated by Forest Hills when it appealed the Director's order to the Environmental Board of Review. This procedure is before this court in cases Nos. 73-915 and 74-8. The third paragraph of R. C. 3745.04 provides, in part:

"Any person who was a party to a proceeding before the Director may participate in an appeal to the Environmental Board of Review for an order vacating or modifying the action of the Director * * *."

The second paragraph of R. C. 3745.04 defines the word "action," as used in the statute, to include "the issuance, modification, or revocation of any lawful order other than an emergency order * * *."[4]

The Environmental Board of Review, in the appeal filed by Forest Hills, ruled that the July 9, 1973, order was an emergency order lawfully issued under R. C. 6111.06 (C), and, hence, that the "emergency order" exception to its jurisdiction prevented it from reviewing the case. That ruling was erroneous. The board, and the Court of Appeals in reviewing the board's ruling, should have held that since the Director's order was issued without compliance with R. C. 6111.16 and 6111.17, it was unlawful and, therefore, vacated.

In case No. 74-8, the appeal (cross-appeal) filed in conjunction with case No. 73-915, the Director seeks a ruling from this court that the Environmental Board of Review does not have jurisdiction to review an emergency order issued under R. C. 6111.06 (C) until there has been compliance with the hearing and final order provisions of

[4] It is obvious that the statutes pertaining to the jurisdiction of the Environmental Board of Review contain inconsistent and confusing language. A literal reading of the second paragraph of R. C. 3745.04 concerning the board's authority to review orders issued by the Director confines that authority to "lawful" orders. However, R. C. 3745.05 expressly authorizes the board to vacate or modify "unlawful" orders of the Director. Because neither party has relied upon the inconsistent language before this court, a resolution of the conflict would be inappropriate in this case.

R. C. 6111.06 (C). Since this case does not involve a legitimate exercise of the Director's R. C. 6111.06 (C) power, the appeal (cross-appeal) will be dismissed.

Case No. 73-874 involves the appeal of the Director's July 9, 1973, order initiated by Forest Hills before the Court of Common Pleas of Franklin County. Forest Hills argues that this court should not reach the merits of this appeal, but, instead, should reverse the Court of Appeals on the ground that the trial court judgment under review denying the Director's motion to dissolve the stay order was not a final and, hence, appealable order. This court agrees with that argument. R. C. 2505.02 defines a "final order" as:

"An order affecting a substantial right in an action which in effect determines the action and prevents a judgment, an order affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment * * *."

The Director contends that the July 9, 1973, order was a valid emergency order issued pursuant to R. C. 6111.06 (C), that that statute expressly makes such an order immediately effective, and therefore that the stay order affected a substantial right vested in the Director for combating a health emergency.

The foundation upon which the Director's contention is based consists of his labeling the July 9, 1973, order as an R. C. 6111.06 (C) order. Since this foundation is faulty, this court need not answer the Director's argument. The July 9, 1973, order itself recites that it was issued to remedy an inadequate water supply situation; such a situation does not justify the invocation of the Director's emergency power. Hence, the order was an invalid exercise of the Director's summary power.

The trial court's overruling of the Director's motion to dissolve the stay order in this case is analogous to an order of a trial court overruling a motion to vacate a temporary injunction. This court has held that such an order is not a final order. *Jones* v. *First National Bank* (1931), 123 Ohio St. 642, 176 N. E. 567. Since there was no final, and hence appealable, order before the Court of Appeals in the action originating in the Court of Common Pleas, the appellate court erred in considering the merits of that case. The appeal should have been dismissed. The judgment of the Court of Appeals in that action is before this court in case No. 73-874. When this court reverses a judgment of a Court of Appeals on the basis that there was no final order before the appellate court, the normal relief granted is a remand to the trial court for further proceedings. *Kennedy* v. *Chalfin* (1974), 38 Ohio St. 2d 85, 310 N. E. 2d 233; *Klein* v. *Bendix-Westinghouse Co.* (1968), 13 Ohio St. 2d 85, 234 N. E. 2d 587. However, no remand will be ordered in case No. 73-874, because the issues in that case are disposed of by this court's opinion and judgment in case No. 73-915.

For the foregoing reasons, the judgment of the Court of Appeals in case No. 73-874 is reversed and the case dismissed. The judgment of the Court of Appeals in case No. 73-915 is reversed; the Director's July 9, 1973, order is vacated and the case dismissed. Case No. 74-8, the appeal (cross-appeal) filed by the Director of Environmental Protection in conjunction with case No. 73-915 is dismissed.

Judgments accordingly.

HERBERT, CORRIGAN, STERN, CELEBREZZE, W. BROWN and P. BROWN, JJ., concur.

THE SUPREME COURT OF THE STATE OF OHIO
JANUARY 29, 1975

No. 73-915

MANDATE

THE STATE OF OHIO,
CITY OF COLUMBUS.
FOREST HILLS UTILITY CO.,
Appellant,

vs.

IRA L. WHITMAN, DIRECTOR,
ENVIRONMENTAL PROTECTION,
Appellee.

To the Honorable Common Pleas Court within and for the County of Franklin, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals reversed and the Director's July 9, 1973, order is vacated and case dismissed, for the reasons set forth in the opinion rendered herein.

THOMAS L. STARTZMAN, *Clerk.*

THE SUPREME COURT OF THE STATE OF OHIO
JANUARY 29, 1975

No. 73-915

APPEAL FROM THE COURT OF APPEALS
for Franklin County

THE STATE OF OHIO,
CITY OF COLUMBUS,
FOREST HILLS UTILITY CO.,
Appellant,

vs.

IRA L. WHITMAN, DIRECTOR,
ENVIRONMENTAL PROTECTION,
Appellee.

This cause, here on appeal from the Court of Appeals for Franklin County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is reversed for the reasons stated in the opinion filed herein; and the Director's July 9, 1973, order is vacated and case dismissed.

It is ordered and adjudged also that appellant recover from appellee its costs expended in this Court; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Franklin County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ___ day of _____ 19___.

_____ Clerk

_____ Deputy

THE SUPREME COURT OF THE STATE OF OHIO
JANUARY 29, 1975

No. 73-874

MANDATE

THE STATE OF OHIO,
CITY OF COLUMBUS.
FOREST HILLS UTILITY CO.,
Appellant,

vs.

IRA L. WHITMAN, DIRECTOR,
ENVIRONMENTAL PROTECTION,
Appellee.

To the Honorable Common Pleas Court within and for the County of Franklin, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals reversed and case dismissed, for the reasons set forth in the opinion rendered herein.

THOMAS L. STARTZMAN, *Clerk.*

THE SUPREME COURT OF THE STATE OF OHIO
JANUARY 29, 1975

No. 73-874

APPEAL FROM THE COURT OF APPEALS
for Franklin County

THE STATE OF OHIO,
CITY OF COLUMBUS.
FOREST HILLS UTILITY CO.,
Appellant,

vs.

IRA L. WHITMAN, DIRECTOR,
ENVIRONMENTAL PROTECTION,
Appellee.

This cause, here on appeal from the Court of Appeals for Franklin County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is reversed for the reasons stated in the opinion filed herein; and case dismissed.

It is ordered and adjudged also that appellant recover from appellee its costs expended in this Court; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Franklin County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ____ day of _____ 19___.

_____ Clerk

_____ Deputy

THE SUPREME COURT OF THE STATE OF OHIO
JANUARY 29, 1975

No. 74-8

MANDATE

THE STATE OF OHIO,
CITY OF COLUMBUS.
FOREST HILLS UTILITY CO.,
Appellant,

vs.

IRA L. WHITMAN, DIRECTOR,
ENVIRONMENTAL PROTECTION,
Appellee.

To the Honorable Common Pleas Court within and for the County of Franklin, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Appeal dismissed for the reasons set forth in the opinion rendered herein.

THOMAS L. STARTZMAN, *Clerk.*

THE SUPREME COURT OF THE STATE OF OHIO
JANUARY 29, 1975

No. 74-8

APPEAL FROM THE COURT OF APPEALS
for Franklin County

THE STATE OF OHIO,
CITY OF COLUMBUS.
FOREST HILLS UTILITY CO.,
Appellant,

vs.

IRA L. WHITMAN, DIRECTOR,
ENVIRONMENTAL PROTECTION,
Appellee.

This cause, here on appeal from the Court of Appeals for Franklin County, was heard in the manner prescribed by law. On consideration thereof, the appeal is dismissed for the reasons stated in the opinion filed herein;

It is ordered and adjudged also that appellee recover from appellant its costs expended in this Court; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Franklin County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ___ day of _____ 19___.

_____ Clerk

_____ Deputy